United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALGER HISS,

Appellant.

BRIEF FOR APPELLEE

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Statement

This is an appeal from a judgment of conviction entered on January 25, 1950 after a trial in the Southern District of New York before the Honorable Henry W. Goddard and a jury (3305).*

The indictment, in two counts, charged the defendant, Alger Hiss, with violating Section 1621, Title 18, United States Code (1948 ed.), in that he testified falsely to two material matters while a witness before a Federal Grand Jury (2-5).

A verdict of guilty on both counts was returned by the jury (3294). The defendant was sentenced to imprisonment for five years on each count, the terms to be served concurrently (3305).

Notice of appeal was filed on January 25, 1950 (3306).

* Numbers in parentheses refer to pages in the printed record, unless indicated to the contrary.

Statute Involved

Title 18, United States Code, Section 1621 (1948 ed.).

§1621. *Perjury generally.*

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

The Indictment

Count One charges that on December 15, 1948, while under oath, before a Grand Jury, sitting in and for the Southern District of New York, investigating possible violations of the espionage and other United States criminal statutes, Alger Hiss wilfully and knowingly testified falsely to material matter when he testified that neither he, nor Mrs. Hiss in his presence, delivered any confidential documents or papers, or summaries of such documents or papers, of the State Department to Whittaker Chambers.

Count Two charges that on December 15, 1948, while under oath before the same Grand Jury, Alger Hiss wilfully and knowingly testified falsely to material matter when he testified that he did not see Whittaker Chambers after January 1, 1937.

Questions Presented

1. Did the Government produce sufficient evidence to support the verdict of guilty on both Counts?

2. Did Judge Goddard correctly construe Count II when he instructed the jury that Count II could be established by proof of any meeting of Mr. Chambers and the defendant after January 1, 1937?

3. Should the witnesses Rosen and Inslerman have been barred from the witness chair because it was possible they would raise their privilege against self-incrimination?

4. Should the testimony of Inslerman, Webb, Massing, Murray and Dulles have been excluded as irrelevant or not proper rebuttal?

5. Did the prosecutor, by conduct or argument, improperly and unduly prejudice the defendant?

6. Did Judge Goddard commit reversible error in his charge or in his supplemental instructions?

7. Was this perjury prosecution barred by the statute of limitations on the grounds that the false testimony related to a crime barred by the statute of limitations?

The Facts

Alger Hiss and Whittaker Chambers were Communists together. This was 1934 (233) in Washington, when Hiss was Assistant General Counsel of the AAA (1809) and Whittaker Chambers was a salaried agent of the Communist conspiracy, organizing an "apparatus" of govern-

ment employees in the nation's capital (235). With contrasting social positions but similar intellectual and ideological leanings, these two men joined forces at the direction of J. Peters, Chief of the Communist Underground in America (233).

Hiss was a Harvard-trained lawyer (1804), married in 1929 to Priscilla Hobson (1805), a socialist (2369). Before joining forces with Whittaker Chambers, Hiss had been a member of a red spy ring headed by Harold Ware (117) [son of "Mother Bloor"] (234), and had guided Noel Field in similar work (1266). The Defendant was given the pseudonym "der Advokat" (276).

Whittaker Chambers was an open Communist. In 1923 he had toured Western Europe, where the moral, economic and physical carnage resulting from World War I indelibly impressed him (221). He had read exhaustively the works of Marx, Lenin and The Fabian Socialists (222). At the age of 24, Mr. Chambers sought out the Communist organization and became a member (388), which fact he then related to his friend and Columbia faculty adviser, Professor Mark VanDoren (389; Ex. N).

Although Mr. Chambers later achieved prominence as a literateur (228) in the revolutionary movement, with editorships of the Daily Worker (226) and the New Masses (228), his early apprenticeship in the Party was marked by menial service (225). He subsequently advanced from editing workers' correspondence to foreign news editor, to the *de facto* editorship (225). Being primarily a philosophical Communist, Mr. Chambers divorced himself from Party activities in 1929 when a factional fight for power developed within the Party (226).

In 1932, after returning to Party work, he was taken from his post as editor of the New Masses and ordered into the espionage corps of the Communist organization

(229). This underground work required the use of aliases. He became a "faceless man", serving as a liasion between the Russian and the American spy units (231).

During the summer of 1934, Mr. Chambers was ordered to Washington where he met Harold Ware and Ware's underground group, which included Alger Hiss (233). At the direction of J. Peters, Hiss left the Ware apparatus in order to serve in a new espionage unit to be organized by Mr. Chambers (235, 236).

A fast friendship soon developed between these two men and their families. Mrs. Chambers' homely characterization describes the relationship: "The Hisses were family to us; they were friends * * *" (1012). There were frequent family visits during the years of their association, from 1934 to 1938, both in Washington at the Hiss residence and in the Baltimore home of the Chambers family (120, 121, 956).

In May, 1935, Hiss gave his apartment on 28th Street to Mr. Chambers, a fellow-Communist needing assistance (242, 958). This courtesy included furniture, telephone, gas, electricity. There was no rent and the use of the Hiss Ford was added.

In the summer of 1935, Mr. Chambers drove with the Hisses to Long Eddy, New York, in a futile search for a summer cottage (245). Ultimately, the Chambers family, under the alias Breen, summered at the Bouchot Cottage in Smithton, Pennsylvania (248). The Hisses were visitors at the cottage (248, 960, 1040), Mrs. Hiss caring for the Chambers' child while Mrs. Chambers painted.

Whittaker Chambers, together with his family, spent several days at the Hiss home on P Street in the autumn of 1935 (248, 961). Originally Mr. Chambers was to leave his wife and child with the Hisses while he performed espionage work in England (249, 289). This plan was

later abandoned, but not before Mr. Chambers obtained a passport as David Breen, using false birth certificates furnished him by J. Peters (249, 289).

Mrs. Hiss, on one of her many visits, remained overnight at the Chambers' Baltimore home to take care of the Chambers' daughter while Mrs. Chambers traveled to New York for prenatal care (1031, 3025). The two families exchanged presents, music, and children's gifts, and on one occasion Mrs. Chambers painted a portrait sketch of Mrs. Hiss' child by her first husband (973, 2297). The defendant recommended a private school for the Chambers' child (1373).

So friendly were they that the Hisses assisted in furnishing the small Chambers' apartment in Baltimore (269, 963). Some of these furnishings are still kept on the Chambers' farm and were shown to one of the defendant's attorneys who asked to see them (631).

It was while Hiss was counsel for the Nye Committee, on loan from the AAA, that he first violated his oath as a Government employee. He obtained confidential State Department documents by virtue of his position with the Nye Committee. Hiss gave these documents to Mr. Chambers, who photographed them on microfilm in the Hiss home for transmittal to Russia (122, 123, 140).

Hiss transferred to the Justice Department during the summer of 1935 after receiving the approval of the Communist leadership (2509, 142). It was about this same time that Hiss came in contact with Mrs. Hede Massing, an admitted Communist spy and courier. A friendly conflict ensued between them as to who would have the espionage services of Noel Field, a State Department officer (1669, 1675).

On December 23rd, 1936, at the direction of Colonel Bykov, a Russian superior, Mr. Chambers purchased four

oriental rugs (254, 718, 719; Exs. 41, 42). This was accomplished in New York through a friend, Professor Meyer Schapiro, of Columbia University. Schapiro, at Mr. Chambers' direction, sent the rugs to George Silverman in Washington, shortly after December 29, 1936 (725; Ex. 42A).

In early 1937, Mr. Chambers gave the defendant one of these rugs, as a gift from the grateful Russian People (255). A second of these rugs was given to Henry Julian Wadleigh (653), another source of secret State Department information for the Chambers' apparatus (402, 1111).

Mr. Chambers and Hiss travelled to New York City to confer with Bykov in January, 1937 (255). At Bykov's bidding Hiss agreed to furnish confidential State Department documents relating to specified nations (256). Pursuant to this understanding, Mr. Chambers visited the Hiss home at two-week intervals to receive all documents taken from the State Department by the defendant that same day. These papers were photographed in Baltimore and returned to Hiss on the same night (258).

This practice continued until mid-1937. Thereafter, to increase production, Mrs. Hiss typed copies or summaries of State documents brought home by the defendant each night (259, 290). An office-type Woodstock typewriter, given Mrs. Hiss by her father, was used for this work. These copies, with notes written by the defendant and any original documents on hand, were called for by Mr. Chambers fortnightly. The material was photographed in Baltimore by Felix Inslerman (259).

Whittaker Chambers broke from the communist conspiracy in mid-April 1938 (260). He retained some copies of secret papers given him by Hiss, along with 5 strips of microfilm prepared by Inslerman, all of which he gave, for safe-keeping, to Nathan Levine, his wife's nephew (260, 727).

The defection was preceded by preparation. To secure an identity, being known in the underground only as "Carl", Mr. Chambers obtained employment with the National Research Project (260), using the unwitting assistance of the Party. In November 1937, he purchased an automobile (715; Ex. 40), financed in part by a $400 loan from Hiss (263, 690, 971). A room on the outskirts of Baltimore was obtained to which the Chambers family moved about April 15, 1938 (264, 970). Mr. Chambers then obtained a commission to translate a book along with a money advance, and moved to Daytona Beach, Florida (265, 971).

By summer 1938, the Chambers family was re-established in the Baltimore community (269, 972). Within a year Mr. Chambers began his career with TIME magazine (270) which culminated, a decade later, in his voluntary resignation from an editorship paying a salary of $30,000 per year (271). Whittaker Chambers then returned to his farm at Westminister, Maryland, where he still resides.

Shortly after the Hitler-Stalin Pact of August 1939, Mr. Chambers was taken by Isaac Don Levine an anti-communist publisher, to Adolph A. Berle, then Assistant Secretary of State in charge of security (271, 274). Berle made notes of the information (615; Ex. 18) given by Mr. Chambers, setting forth, in detail, communist infiltration and espionage in the State Department (274) [It is not insignificant that the defendant was the last name given Berle].

Berle allowed four years to elapse before he gave his notes to the F. B. I. who then interviewed Mr. Chambers (275). Thereafter, Mr. Chambers was twice visited and questioned by Ray Murphy, the security officer of the State Department (275). Mr. Chambers told the same facts to Murphy as he had to Berle (607-611; Ex. 17).

On August 3rd, 1948, Mr. Chambers appeared before the House Un-American Activities Committee* pursuant to a subpoena served upon him the preceding day (280, 281). He testified before this Committee on six occasions, relating his knowledge of communist infiltration in the State Department.

Mr. Chambers named the defendant as one of many communists in government employ in the prior decade. Hiss denied he was a Communist and answered that "the name Whittaker Chambers means nothing to me" (2111).

At a closed meeting of the HCUA on August 17th, 1948, Mr. Chambers and the defendant were brought together for confrontation (281). After examining Mr. Chambers' teeth and the inside of his mouth and ascertaining the name and address of Mr. Chambers' dentist (282, 1987, 1989), Hiss identified his former friend as an alleged indigent writer, whom he knew in 1935 as George Crosley (282).

Hiss dared Mr. Chambers to state, without the committee room, that he was a communist (282). Chambers did so—twice. A defamation complaint was filed on September 27, 1948 in the Maryland District Court by Hiss (2448). Mr. Chambers, admitting the publication, pleaded truth as a defense (283). That cause is still at issue.

On November 4th, 1948, Hiss' Baltimore and New York attorneys began an exhaustive pretrial examination of Mr. Chambers and his wife (283), which continued after the indictment was filed (284).** After a demand by Hiss' attorneys for documentary proof, Mr. Chambers went to New York and obtained the papers and microfilm given Nathan Levine in 1938 (291, 727). On November 17th,

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* Hereafter referred to as HCUA.

** These depositions ultimately consumed 1300 pages (2206) and included such pertinent questions as the birthplace of Mrs. Chambers' parents (2467).

1948, Mr. Chambers produced the papers he had received from Hiss a decade before (293).* In total, this constituted four notes written by the defendant and sixty-five typewritten pages, sixty-four of which were typed on the Hiss' Woodstock machine (B. 1-47). These papers are all dated between January 5, 1938 and April 1, 1938.

The five strips of undeveloped microfilms, three of which proved to have been exposed, were retained by Chambers until they were subpoenaed by the HCUA on December 2nd, 1948 (294). The Committee agents accompanied Chambers to his farm where he removed the films from a pumpkin in which he had placed them earlier that day for safekeeping (294).**

On December 15, 1948, the defendant was called before a Grand Jury sitting in the Southern District of New York, investigating possible violations of the espionage and other United States criminal statutes (202). While under oath he furnished the testimony which forms the bases for the indictment (209, 210; Exs. 1, 2).

After a first trial which resulted in a jury disagreement (179), the defendant was found guilty of both counts on January 21, 1950 (3294).

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* These Baltimore Papers were Marked as Government Baltimore Exhibits (B. 1 *et seq.*) and the underlying official documents as Government State Exhibits (St. 1 *et seq.*).

** Exs. 11, 12, the microfilms, are enlarged as B. 48, 50-55, the number B. 49 being used at the deposition for an exhibit, not relevant to the criminal trial (301).

POINT I

Evidence establishing Count I was not only sufficient but was overwhelming.

The defendant contends that the prosecution failed to establish a prima facie case, arguing that there was no corroboration of the testimony of Mr. Chambers. Notwithstanding the well-considered verdict, which this Court will not upset where the evidence, if believed, is sufficient, *Glasser* v. *United States,* 315 U. S. 60, 80 (1942); *Whaley* v. *United States,* 141 F. 2d 1010 (5th Cir. 1944), *cert. denied,* 323 U. S. 742 (1944); *United State* v. *Tempone,* 136 F. 2d 538 (2nd Cir. 1943), an elaborate argument is advanced that the Government's proof was inadequate. Defendant proceeds on the theory that the prosecution falls if it is remotely possible that one of the many State Department documents underlying the Baltimore Papers was unavailable to him. As a fillip to this, it is contended that better espionage practice would have required a selection of more informative documents and a greater caution in eliminating traces of guilt.

To lend substance to this hypothesis, it is suggested that possibly Wadleigh stole the documents. And if Wadleigh didn't, some other spy or confederate did, or, perhaps, a clerk, or a messenger, or a charwoman, *et cetera.* Mr. Chambers conceived his false tale, contends the defendant, because he is mentally ill.

As Point III the defendant contends that even if adequate for a *prima facie* case, the Government's proof was not strong. These contentions were rejected by the jury and are refuted by the record.

A. *The two-witness rule.*

In *United States* v. *Weiler,* 323 U. S. 606 (1945), the Supreme Court held that in the federal courts the government must satisfy the two-witness rule to establish a *prima facie* case of perjury. In brief, to reach the jury, the government must produce two witnesses to the falsity of the alleged perjurious testimony. As an alternative, the prosecution must offer one such witness in addition to some form of corroborative evidence.

The Supreme Court defined this required corroborative evidence as follows:

> "Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, *substantiates* the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy. To resolve this latter question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury" (italics added). *United States* v. *Weiler, supra,* at 610.

Professor Wigmore formulated a proper jury charge on the proposition. The content is the same.

> "* * * as to the *nature of the corroboration,* no detailed rule seems to have been laid down nor ought to be laid down. The jury should be instructed not to convict unless the testimony of the principal witness has been so corroborated that they believe it to be true beyond any reasonable doubt." 7 Wigmore, Evidence (3d ed. 1940) §2042, p. 278.

In terms of synonyms, the Court in *United States* v. *Hall,* 44 Fed. 864 (S. D. Ga. W. D. 1890) defined corroboration as follows:

> "The term 'corroborate the accusing witness' means to make strong; to strengthen; to support; to tend to establish the truth of the statement of the accusing witness" (p. 868).

Admissions of a defendant are sufficient corroboration. *Hart* v. *United States,* 131 F. (2d) 59 (9th Cir. 1942); *United States* v. *Buckner,* 118 F. (2d) 468 (2nd Cir. 1941). The testimony of two witnesses to two different and independent events proving the falsity of the defendant's testimony satisfies the rule. (*United States* v. *Seavey,* 180 F. (2d) 837 (3rd Cir. 1950), *cert. denied,* 339 U. S. 979 (1950); *United States* v. *Margolis,* 138 F. (2d) 1002 (3rd Cir. 1943); *United States* v. *Palese,* 133 F. (2d) 600 (3rd Cir. 1943).

In *Buckner* v. *United States,* 154 F. (2d) 317 (App. D. C. 1946), the sufficiency of the corroborative proof was challenged. At a previous trial defendant had denied that a statement, offered by the prosecution, bore his signature. He was indicted for this perjury. At the perjury trial the police officer, who took the statement and saw defendant sign it, so testified. The only corroborative testimony was by a handwriting expert who stated that in his opinion the signature on the statement was defendant's. This proof was held sufficient corroboration to satisfy the "two-witness rule."

In other instances where corroboration is required as a matter of law, the same general content is given to the term: *e.g.* for corroboration of an accomplice's testimony. *Tate* v. *State,* 204 Ark. 470, 163 S. W. 2d 150 (1942); *State*

v. *White,* 56 Ariz. 189, 106 P. 2d 508 (1940); for corroboration in rape prosecutions, *People* v. *Vaughn,* 390 Ill. 360, 61 N. E. 2d 546 (1945); for corroboration of adultery, *Lake* v. *Lake,* 60 N. Y. S. 2d 105 (Sup. Ct. 1946); for corroboration of a confession, *Anderson* v. *United States,* 124 F. (2d) 58, 65 (6th Cir. 1941).

An examination of the independent evidence presented by the prosecution to corroborate the testimony of Mr. Chambers establishes that it completely substantiates that testimony.

B. ***Evidence establishing Count I.***

Count I charged that the defendant testified falsely when he denied giving original State Department documents, together with copies and summaries of State papers, to Mr. Chambers. The defense was that this testimony of the defendant was true. This defense was destroyed by the convincing testimony of Mr. Chambers and the equally convincing corroborative proof.

1. Mr. Chambers' testimony.

Whittaker Chambers testified that the defendant gave him original State Department documents, together with copies and summaries of State papers (259, 290). To receive these papers, Mr. Chambers called at the Hiss home at intervals of about two weeks, for a period of more than a year (260). The documents were taken by Mr. Chambers to Felix Inslerman in Baltimore to be photographed (258). Ultimately, all original papers were returned to the defendant and all microfilms were given to Mr. Chambers' superior, with the exception of the Baltimore papers and microfilm.

Mr. Chambers identified the two developed rolls of microfilm as typical specimens of the many produced by Insler-

man from papers supplied by the defendant (299, 301). When developed, these films contained photographs of State Department papers available to the defendant. Inslerman identified his camera (1257), which was proved to have been used in producing the two microfilm rolls (1303-1308; Exs. 52, 53).

Mr. Chambers testified that he entered the Hiss residences in the course of receiving the State papers from the defendant (276, 277). Any visit by Mr. Chambers to the Hiss home after the summer of 1935 was vigorously denied by Hiss. In answer, Mr. Chambers described the interiors of the Hiss homes in 1936, 1937 and 1938 with the accuracy and detail that only one familiar with the houses could offer.

Mr. Chambers testified to a close social association with the Hiss family that was the environment of their partnership in espionage. He referred to the defendant's interest in bird-watching (564), which Hiss later admitted. In September 1939, Mr. Chambers told Berle of Mrs. Hiss' socialist activities, which she ultimately admitted, after early denials (2369).

When interrogated by the HCUA, Mr. Chambers stated that he had been given the use of the defendant's apartment and automobile (242). He also stayed with his family at the Hiss' P Street house in the early autumn of 1935 (248). Hiss, of necessity, conceded this, contending only that the P Street stay was in May 1935; this to suggest that their limited association ended with the occupation of the 28th Street apartment in June of 1935.

Mr. Chambers testified that he gave the defendant an oriental rug (255). He stated that the rug was one of four, purchased at Bykov's direction, and given to four of Mr. Chambers' co-conspirators as gifts of a grateful Russian people. Professor Meyer Schapiro recalled buy-

ing the four oriental rugs for his friend, Mr. Chambers (725). The seller Touloukian produced the receipts establishing the sale and delivery to Schapiro, who sent them to George Silverman in Washington, at Chambers' request (718, 719). Henry Julian Wadleigh acknowledged the receipt of a rug (1130). Finally, the defendant admitted receiving such a rug from Mr. Chambers, disagreeing only as to the time of the delivery and the conversation on that occasion (2013).

Mr. Chambers testified that he inspected a farm in Westminister, Maryland, with the defendant. Mr. Chambers recalled that the defendant intended to purchase the farm but withdrew. Mr. Chambers said he then bought the identical property (163). It was established that Hiss had contracted to buy a Westminister farm and then had withdrawn from the transaction (1902). Finally, it was conclusively proved that the same farm was later purchased by Mr. Chambers, in his wife's name (489; Exs. Y-1, 2, 3).

Mr. Chambers recalled that the Hisses had given some of their old furnishings to complete the outfitting of the Chambers' apartment (269). When asked at the Baltimore Depositions to produce this furniture, Mr. Chambers explained that the remnants were still on his farm. These were inspected by Mr. McLean (631). Mr. McLean did not testify to contradict this testimony. Since he was only as far away as the table of the defense attorneys, it can only be assumed that McLean found all to be as stated by Mr. Chambers.

Mr. Chambers described friends and servants of the Hisses. He described their servant, Martha Pope, as the "ailing" maid (462). Mrs. Hiss used the identical term to describe Miss Pope (2302). Mr. Chambers met a friend of the Hisses with the improbable name of Plum Fountain,

who was a Bryn Mawr alumna (457). Miss Fountain materialized and is a Bryn Mawr alumna (1785).

Mr. Chambers testified that he drove to New Hampshire with the Hisses on August 10th, 1937, stayed at Bleak house, and while in the nearby town of Peterboro, saw a performance of "She Stoops to Conquer" (278, 279) with the Hisses. Investigation established that the Peterboro Players presented that play on that evening. There was a nearby Bleak house at which travelers could stay. State Department records disclosed that Mr. Hiss was not at work in Washington during this period (745; Ex. 47).

Mr. Chambers testified that the Hisses loaned him $400 in cash a few days before November 23, 1937 and that this money was used to purchase a Ford in Randallstown, Maryland (263). From the records of the Schmidt Motor Company in Randallstown it was proved that the Chambers bought a Ford on November 23, 1937, paying $486.75 in cash (715). Records of a Hiss bank account disclosed a withdrawal on November 19, 1937 of $400 in cash (690). The offered explanation that this $400 was used by Mrs. Hiss to purchase furniture for her new Volta Place home was discredited by conclusive proof that the Hisses did not lease that house until December (3061).

The inherent improbability of attempted explanations by the defendant to cover incriminating facts, constituted a persuasive corroboration of Mr. Chambers' testimony. *Beck* v. *United States,* 140 F. 2d 169 (App. D. C. 1943); *Wilson* v. *United States,* 162 U. S. 613, 620-621 (1896).

Wherever documents or witnesses could be uncovered with information touching on Mr. Chambers' testimony, they were produced. In every detail they substantiated that testimony. As a consequence, that testimony constituted a strong and indestructible foundation for the jury's verdict. Vicious attacks on the credibility of Mr. Chambers

were ineffective. At best, they raised an issue of credibility which the jury determined against the defendant. *United States* v. *Freeman,* 167 F. 2d 786 (7th Cir. 1948), *cert. denied,* 335 U. S. 817 (1948); *Applebaum* v. *United States,* 164 F. 2d 974 (5th Cir. 1947).

2. The corroborative evidence.

Equally overwhelming and trustworthy was the corroborative proof which included the following: The documents or Baltimore Papers; their counterparts in the State Department files, *i.e.,* the State Department Papers; the accessibility of the State Department Papers to the defendant; the admission that four of the Baltimore Papers are in the defendant's handwriting; the uncontradicted testimony that the Baltimore Papers were typed on the Hiss typewriter (Ex. UUU); the evidence, including admissions by the defendant and his wife, that the typewriter was in the Hiss home in February and March 1938, when the Baltimore Papers were typed.

a. The source of the Baltimore Papers and microfilm.

Baltimore 1-4 are four memoranda, admittedly in the defendant's handwriting. They are virtually verbatim copies of four cables which came to the State Department in the early months of 1938. Mr. Chambers testified that he received these memoranda from Mr. Hiss (297, 298).

The evidence establishes that these notes were given to Mr. Chambers by the defendant. They were given in place of typewritten copies only because the particular documents, for some cause, could not be taken home by the defendant. Although Hiss testified otherwise, Mr. Sayre, his superior, stated that such notes were not used by Mr. Hiss in his reports (1486, 1493, 1507). Miss Lincoln, Sayre's

secretary, said it was not Hiss' practice to make such notes, where, as here, the papers referred to matters not of special interest to Mr. Sayre (938). She pointed out that the tops of two notes containing the legend, "Office of the Assistant Secretary of State" (937), had been torn off.

As a last effort, the defendant suggests that the memos must have been stolen from his desk or files and given to Mr. Chambers because it would have been poor espionage for him to have been the source. This is so, argues the defendant, because one note is difficult to read, another contains a few abbreviations and a third omits useful information contained in the cable being copied. In fact, the one note is quite legible, particularly when photographed as was Mr. Chambers' practice (590; Ex. 14); the abbreviations referred to are clear; finally, the excellence of the defendant's espionage work is not in issue [and if this was in issue, there is ample evidence in the record to establish that defendant was at least "adequate"]. At best this argument was one for the jury which rejected it.

Experts realized almost immediately that all of the typewritten Baltimore Papers produced by Mr. Chambers on November 17, 1948, with the exception of Baltimore 10, had been typed on the same machine. The importance of finding that machine and ascertaining its possessor in the first four months of 1938 was obvious.

On December 4th, 1948, the defendant, in the presence of his attorney, was interviewed by the F. B. I. with a view to determining what typewriter the Hisses had in early 1938 and how they had disposed of it. While at the place of interview, one of his attorneys informed the defendant by telephone, that the Hiss 1938 typewriter had been a Woodstock. In his statement to the F. B. I., Hiss then

helpfully said that the machine might have been an Underwood, but he was not sure (1979; Ex. 33).

Mrs. Hiss told the Grand Jury that she had given the Woodstock machine to a junk-man. Mrs. Hiss also told the Grand Jury of the death of Clydie Catlett, her maid during the years 1936, 1937, 1938 (2365, 2499). This maid, reincarnate, testified for the defendant. In her innocence, and to the consternation of defense trial counsel, Mrs. Catlett identified Mr. Chambers from a passport photo, and without benefit of dentures (1569).

It was subsequently established beyond contradiction that the Hiss typewriter had been an office-type Woodstock. Moreover, the machine had actually been given by the Hisses to their maid's young sons, to serve as a toy (1586). When the F. B. I. asked one of these now grown boys whether the Hisses had a typewriter he answered in the negative (1625). Then this man, Raymond Catlett, immediately went to the defendant's brother and agreed to produce the much-sought-after typewriter, for a fee (1626, 1627).

As an alternative method of determining whether the Hiss machine was used to type the Baltimore Papers, specimens of typing from that machine were sought. The Hisses were asked to provide such specimens to prove their innocence. Although Mrs. Hiss had only just read her 1937 typewritten report as a Bryn Mawr Alumnae officer, which had been typed on the Woodstock, she did not mention this document (2496). Instead specimens typed on a later-owned portable machine were supplied by the Hisses.

Ultimately, through its own efforts, the F.B.I. obtained specimens of typing from the Woodstock, still apparently lost [the Woodstock was dramatically produced by the defense in the course of the first trial]. At this point,

additional superfluous examples of the Woodstock work were submitted by the defendant. From these specimens, both the government's experts, and those experts who served for the defense (201), concluded that the Baltimore Papers, with the exception of Baltimore 10, were typed on the Woodstock typewriter, given Mrs. Hiss by her father (1074).

The Hisses originally stated that the Woodstock was in their Volta Place house at least during the first quarter of 1938 (1917, 1978, 2499). When the significance of this admission was made apparent by the dates on the Baltimore Papers, the defendant and his wife recalled that the typewriter had been given to the Catletts when the Hisses moved to Volta Place on December 29, 1937 (2350, 2492).

Mrs. Hiss could now see the Woodstock being carried from the Hiss' Volta Place house by the Catlett boys, in their little wagon (2351). Raymond Catlett could still see the Woodstock being driven from the Hiss Volta Place house to the Catletts' home by Mrs. Hiss (1630). The date of this transfer was fixed in the minds of the Catletts by contemporaneous circumstances. These circumstances establish that the transfer could not have been in December 1937 but had to be some time after April 1938.

As a first circumstance, the Catletts and Hisses are certain that the Woodstock was taken to the Catlett home on P Street while the Hisses were in the process of moving (1584, 1586). By their lease, the Catletts moved to P Street on January 17, 1938, after the Hiss move to Volta Place on December 29th, 1937 (2965, 2966; Ex. 70). Hence, the Woodstock could not have left the Hiss possession on their move to Volta Place, since the Catletts did not then live on P Street.

An attempt was made to remedy this difficulty by the suggestion that the Catletts moved into P Street before

their lease indicates. Raymond Catlett testified that they went without electricity for this period, the utility records indicating that their services did not commence until January 18, 1938 (1607-1612). Whatever value this story might have possessed was destroyed when a subsequent defense witness disclosed, by other utility company records, that the electricity was not turned off in the former Catlett home until January 17th (1733). Hence, by theory number two the Catletts would have been living in darkness on P Street while they paid for unused electricity facilities in their former home. Moreover, George Roulhac, a member of the Catlett household, testified that the Catletts did not enter the P Street house until the 17th of January, 1938 (2966).

As a second circumstance, Perry Catlett was certain that shortly after his family received the Woodstock he carried it to a repair shop on the Northwest corner of Connecticut Avenue and K Street in Washington. (1725). It was then established that this shop was not in business until September 1938 (2975; Ex. 71). Moreover, a second repair shop on K Street, later suggested as the shop at which Catlett called, did not open until May of the same year (2978; Ex. 72).

From this evidence the jurors could reasonably conclude and were logically compelled to conclude that the typewritten Baltimore Papers were typed on the Hiss typewriter with the knowledge and assistance of the defendant.

Baltimore 48, 50-55 are enlargements of microfilm given by Mr. Chambers to the HCUA, pursuant to subpoena (301). Independent evidence established that the films were made by Inslerman's camera, as Mr. Chambers testified (1257, 1303-1308; Exs. 52, 53). The documents photographed were accessible to the defendant. This

proof was in corroboration of Mr. Chambers' testimony and with that testimony served as a sufficient basis for a jury determination that the underlying documents were given Mr. Chambers by the defendant.

b. The contents of the Baltimore Papers and microfilm.

Baltimore 1-4 are almost verbatim copies of four cables which came to the State Department between the days of January 28th, 1938 and March 11, 1938 (St. 1-4). By way of procedure, cables went first to the Division of Communications and Records in the State Department, to be decoded. A yellow action copy was made and sent to the Department offices required to take some affirmative action (751, 762, 2182, 2429). In addition, several white information copies were made. Information copies were sent to those offices seeing the action copy and to other interested offices as well (1389, 1413, 2431).

One white copy of each cable was retained in DCR to indicate the offices that received information copies (753, 1401, 2430). Stamped on the left margin of this distribution sheet was a list of the State Department offices. Either a check or an "X" was made next to each office which received information copies (2428-2437). The distribution copies of the State Department Papers involved in this prosecution are usually marked as subexhibit A to the related action copy which is marked as a State Exhibit.

The four Baltimore notes were concededly written by the defendant. They contain secret information intended only for authorized officers of the State Department. The absence of defense in regard to these notes was and is fatal to the defense. By this alone was Count II established.

Baltimore 5-47, excluding Baltimore 10, are documents, now admitted to have been typed on the Hiss Woodstock. They are copies or summaries of papers received by the State Department between January 5 and April 1, 1938.

Most of these papers are incoming cables. The distribution copy of each of these cables, with the exception of two (890-893), indicates that a copy went to Sayre's office, where the defendant worked. However, the absence of markings as to these two was undoubtedly an oversight by a clerk checking the two distribution copies, as even the defendant concedes (Defendant's brief p. 23). For example, the distribution copy of a cable included in Baltimore 55 does not indicate a copy to Sayre. Yet it is conceded that Sayre's office received one since his stamp with the initials "A. H." are on a copy. Certainly, the jury could reasonably infer that copies of all these cables reached the defendant.

A few of the State documents underlying the typewritten papers were despatches received by diplomatic pouch, while others were intra-department memoranda. Distribution of both categories was indicated by office stamps or initials on the document (765, 795-797, 800, 802, 928). As to these two groups, question is raised only as to State 13, the contention being made that it bears no Sayre stamp, therefore, it was never available to the defendant.

First assuming it did not go to Sayre's office the defendant, as Sayre's alter-ego, could well have acquired possession of State 13 for one day, by means now unascertainable. The defendant had access to any office in the State Department. Moreover, there is strong evidence, sufficient for a jury inference, that State 13 did in fact go to Sayre's office.

State 13 is a memorandum dated February 9, 1938 by Jones of the Far Eastern Division. It summarizes a des-

patch from the Yokohama Consul, Richard F. Boyce, dated January 18, 1938. State 13 was sent to the interested offices with the Boyce Despatch (Ex. VV). The Boyce despatch bears no receiving stamp of Sayre's office. However, these two documents with State 15, a memo by Dr. Stanley K. Hornbeck (then Adviser on Political Relations) dated February 11, 1938 were stapled together in the State Department files (915) when first examined. The Hornbeck chit clearly indicates that it, with whatever was joined with it, went to Sayre's office. Mr. Hornbeck could not deny that his chit accompanied State 13, through the various State offices (1363). Hence, the jury could well infer that State 13 reached Sayre's office and the defendant.

In any event, the absence of further positive proof certainly does not now necessitate the setting aside of the verdict where but one of forty-six documents is even challenged. The proof is overwhelming that all of the documents did reach the defendant and were available to him for copy or summarization.

Mr. Chambers identified Exhibits 11 and 12 as microphotographs of State Papers given him by the defendant. These films contained 58 pictures, comprising seven original State Department documents (B. 48, 50-55). The pictures were all made on one camera run and were of documents supplied by one person.

Baltimore 48, 50-53 are microphotographs of a series of papers relating to trade-agreement negotiations with Germany. Baltimore 54 and 55 contain photographs of information copies of 3 incoming cables. Each copy bears the stamp of Sayre's office with the initials "A. H.", made by the defendant in his routine (1972).

The trade-agreement papers photographed were either carbon copies of the original documents or products of a second typing of the original State Papers. Defendant contends that only the original documents went to Sayre's office, hence no copies would be available to him for transfer to Mr. Chambers. However, Mr. Hawkins, the author of Baltimore 48, testified that he may well have sent to Sayre's office a copy of his work together with the original (1343). Moreover, there was additional testimony that, as a matter of routine, copies of the trade agreement papers would accompany the originals. In his brief (Defendant's Brief, p. 47), the defendant argues that a copy of such a communication would have travelled with the original to the Trade Agreements section and there be available to Wadleigh.

With additional copies of these trade agreement papers concededly in existence, it is highly improbable that one copy did not go with the original to Sayre's office. In any event, this argument was submitted to the jury and they rejected it with good basis.

As to Baltimore 54 and 55, the sole argument is that Hiss would have been a poor spy to take documents stamped by his office and bearing his initials. Lack of perfection in espionage does not support an inference of innocence. The defendant knew he would not be apprehended and he was not.

Defendant's argument that unknown persons, rather than he himself, assisted Mr. Chambers was made *ad nauseum* to the trial jury. They had to listen to it. They made their finding. They decided it was the defendant and not Rumblestilkskin who gave Whittaker Chambers the Baltimore Papers. That finding was compelled by the evidence. No argument requiring its overthrow has been forthcoming.

The suggestion that Mr. Chambers used the Hiss typewriter while at the Catlett home was revealed as the absurdity it is, in the government's summation (3255). To reallege it at this time is without value. The same is true of the psychiatric testimony.

POINT II

Judge Goddard correctly rejected defendant's narrow construction of Count II. Evidence establishing Count II was not only sufficient but was overwhelming.

The defendant was found guilty on each of two counts. He was sentenced to five years on each count, the sentences to be served concurrently. While argument on Count II is rendered academic upon the decision of this Court affirming the judgment of conviction on Count I, *Danziger* v. *United States,* 161 F. 2d 299, 301 (9th Cir. 1947), *cert. denied,* 332 U. S. 769 (1947); *United States* v. *Barton,* 145 F. 2d 939, 944 (2nd Cir. 1944), the government will refute as well, the arguments relating to the Second Count.

A. *Judge Goddard correctly interpreted Count II.*

Count II of the indictment charges that the defendant testified falsely before the grand jury as follows:

> "Q. Now, Mr. Hiss, Mr. Chambers says that he obtained typewritten copies of official State documents from you. A. I know he has.
>
> Q. Did you ever see Mr. Chambers after you entered into the State Department? A. I do not believe I did. I cannot swear that I did not see him some time,

say, in the fall of '36. And I entered the State Department September 1, 1936.

Q. Now, you say possibly in the fall of '36. A. That would be possible.

Q. Can you say definitely with reference to the winter of '36. I mean, say, December, '36? A. Yes, I think I can say definitely I did not see him.

Q. Can you say definitely that you did not see him after January 1, 1937? A. Yes, I think I can definitely say that.

Mr. Whearty: Understanding of course, exclusive of House hearings and exclusive of the Grand Jury.

The Witness: Oh, yes" (4).

The indictment alleges, in an added paragraph, that Mr. Chambers and the defendant met and conversed in February and March, 1938.

Judge Goddard instructed the jury:

"To find the defendant guilty on Count II, you must believe beyond a reasonable doubt

A. Mr. Chambers' testimony that he met Mr. Hiss after January 1, 1937; and

B. That there is trustworthy corroboration of his testimony * * * by either

(1) Other evidence as to this particular meeting or meetings

or

(2) Mrs. Chambers' testimony regarding that particular meeting of Mr. Hiss and Mr. Chambers after January 1, 1937.

> * * * if you are convinced beyond a reasonable doubt by Mr. Chambers' testimony and either by other evidence that corroborates that part of his testimony or by Mrs. Chambers' testimony that the defendant saw Mr. Chambers after January 1, 1937, you may find the defendant guilty on Count II, * * * " (3272, 3274).

The defendant now contends that this instruction constituted error in that Count II could only be established by proof of meetings between Mr. Chambers and himself in February and March, 1938, at which secret State Department documents were given to the former.

The defendant agrees (Defendant's Brief p. 64) that the allegation of meetings in February and March, 1938, was superfluous if the balance of the indictment set forth the testimony and specified its falseness with sufficient clarity. *United States* v. *Otto,* 54 F. 2d 277 (2nd Cir. 1931); *Sharron* v. *United States,* 11 F. 2d 689 (2nd Cir. 1926). See *Flynn* v. *United States,* 172 F. 2d 12 (9th Cir. 1949). This flows from the policy enunciated in Rule 7(c) of the Federal Criminal Rules that an indictment need only state the crime charged with such clarity and precision that the defense may be prepared and double-jeopardy averted. *United States* v. *Bickford,* 168 F. 2d 26 (9th Cir. 1948); *United States* v. *Starks,* 6 F. R. D. 43 (S. D. N. Y. 1946).

However, as a first theory, the defendant proposes that Count II is unintelligible without the final paragraph. He argues that it is impossible to know in what respect the testimony was false without reading the allegation of meetings in February and March 1938. An examination of the testimony quoted in Count II destroys this contention.

The first statements by Mr. Donegan (the interrogator) and the defendant merely expresses a mutual recognition of Mr. Chambers' testimony that he received State De-

partment documents from the defendant. Mr. Donegan then asked the defendant if he saw Mr. Chambers at any time after entering the State Department.

This query was obviously to ascertain when the defendant alleged he severed his association with Mr. Chambers. The Baltimore papers were dated January, February and March, 1938. Hiss entered the State Department on September 1, 1936. Hence, the question concerned a period of more than a year preceding the occasions in early 1938 when Mr. Chambers was given the Baltimore papers. This new line of questioning was, therefore, necessarily independent of the inquiry regarding the Baltimore papers.

Characteristically, the defendant qualified his answer: possibly he saw Chambers in the fall of 1936. [Later the defendant decided that he did not see Mr. Chambers after the Spring of 1936 (1869).]

Mr. Donegan pressed for a clear statement of the defendant's recollection as to the date of his break with Mr. Chambers. Finally, the defendant was asked if he saw Mr. Chambers after January 1, 1937, a date more than a year preceding the transfer of the Baltimore papers. Hiss answered in the negative.

If Count II was to refer only to meetings in February and March, 1938, testimony would not have been quoted referring to the first day of 1937. Each question and answer quoted in Count II refers to meetings between Mr. Chambers and the defendant long preceding February and March 1938. The falsity obviously lay in the fact that the defendant did see Mr. Chambers after January 1, 1937.

It is idle now to contend that the defendant could not know, from the quoted testimony, in what respect his testimony was alleged to be false. This contention falls with a reading of the Count. And from this conclusion it follows that the final paragraph was superfluous, particularly when

it is noted that the date therein is not the occasion of the crime charged, *i.e.*, perjury.

It further follows that the allegations in that paragraph did not circumscribe the proof relevant to prove Count II. The prosecution was required to prove only that the crime charged was committed by the defendant " * * * prior to the date of the indictment, within the period of limitation, and within the jurisdiction of the court * * * " *United States* v. *Perlstein,* 126 F. 2d 789 (3rd Cir. 1941), cert. denied, 316 U. S. 678 (1942); *United States* v. *Krepper,* 159 F. 2d 958, 964 (3rd Cir. 1946), cert. denied, 330 U. S. 824 (1947). The prosecution satisfied this criterion. See *United States* v. *Wilson,* 154 F. 2d 802 (2nd Cir. 1946), vacated on other grounds, 328 U. S. 823 (1946); *Winslett* v. *United States,* 124 F. 2d 302 (5th Cir. 1942); *United States* v. *Cohen,* 73 F. Supp. 96 (W. D. Pa. 1947).

As a second theory, the defendant contends that he succeeded in narrowing the scope of Count II by the device of an order granting a Bill of Particulars. In his motion for a Bill of Particulars, the defendant requested all conceivable details of the meetings of Hiss and Mr. Chambers in February and March, 1938 (7-11).

This motion was argued on February 24, 1949 before the Honorable William Bondy (44). At that time Mr. and Mrs. Chambers had been questioned in the Baltimore depositions for several days. McLean, one of Hiss' many attorneys, was present at the depositions and also argued the motion (45, 56). He was familiar with Mr. Chambers' testimony before the HCUA. Mr. McLean undoubtedly knew that Mr. Chambers claimed a long and intimate association with the Hiss family, extending from the summer of 1934 until mid-April 1938.

On the argument, Mr. Whearty spoke for the government. He repeatedly and unequivocally stated that Count

II was not based solely on meetings of the defendant and Mr. Chambers in February and March 1938. Speaking at first of the documents, but including a mention of all meetings, the Government's representative said:

> "We will freely acknowledge that the Baltimore papers and the pumpkin papers are claimed by the Government to have been given to Chambers by Hiss, but we do not wish by such a concession to bar the Government from introducing into evidence at the trial, evidence that over a period beginning in January of 1937 and continuing for the next year and three months on an average schedule of every week or ten days or possibly fortnightly, Hiss and Chambers met and that at those times Hiss delivered documents to Chambers" (49).

If any doubt could remain as to the scope of Count II it was removed by the following:

The Court:

> "Are you ready to say that the conversation referred to in Count 2 is the same or supplemental to any alleged conversations alleged in Count 1?"

Mr. Whearty:

> "Once again, we cannot specify specific details. What we will have to do is merely cite that at certain periods, fortnightly or every ten days or so, Hiss and Chambers met. In addition to which I think there were two or three social visits—maybe five—what was it he testified to? Five in all, two in Baltimore and three here" (67, 68).

Judge Bondy stated, as his understanding, that the Government intended to prove under Count II meetings every ten days or so after January 1, 1937 (68). Mr. McLean did not, and could not, express a contrary interpretation. Finally, Mr. Whearty again noted that proof of Count II would include evidence of some three to five social visits between the Chambers and Hiss families (68).

Fully aware that Count II was not limited to alleged meetings in February and March, 1938, Mr. McLean submitted an order which, in this regard, asked only for details of the meetings in those two months of 1938 (80-86). This was the extent to which the defendant's motion had been granted. No amendment of the motion for a Bill was sought, either in writing, or orally at the argument of the motion, to cover particulars of other meetings after January 1, 1937.

For its Bill of Particulars the Government gave that information required by the defendant's order (87), drawn by the attorney who well knew that Count II was not limited to the meetings of February and March, 1938. The order in no way directed that particulars be supplied as to any other meetings. Hence, the Bill did not limit the Government's proof as contended by the defendant.

The interpretation of Count II by Judge Goddard and his instructions to the jury on the Count were correct.

B. *Count II, as interpreted by Judge Goddard was established.*

Proceeding upon the ruling of Judge Goddard, which gave to Count II its obvious content, Count II was established by proof of several independent meetings of the two men in 1937.

1. Testimony of Mr. and Mrs. Chambers.

Mr. Chambers recalled a visit of the Hisses to the Chambers' Baltimore home in December 1937 (262). Mrs. Chambers testified to the same visit, placing it about the middle of December, 1937 (968). There was understandable uncertainty on the part of both as to the precise day in December and as to the occasion for the visit. Suffice to say, there was the testimony of two witnesses to a meeting of Hiss and Chambers. The Jury could properly have found the defendant guilty of Count II on this evidence alone.

In any event, even assuming the Chambers were speaking of 2 separate visits by Hiss to the Chambers home, they both nonetheless testified to the falsity of the defendant's testimony and therefore satisfied the two witness rule. *U. S.* v. *Seavey,* 180 F. 2d 837 (3rd Cir. 1950), *cert. denied,* 339 U. S. 979 (1950); *U. S.* v. *Palese,* 133 F. 2d 600 (3rd Cir. 1943).

2. Testimony of Mr. Chambers and corroborative proof.

a. The rug.

Mr. Chambers testified that in January 1937 he met the defendant and gave him an oriental rug. Mr. Chambers stated that he purchased the rug, with three others, through his friend Professor Schapiro.

Professor Schapiro testified that in December 1936, with money given him by Chambers, he purchased 4 oriental rugs from Edward H. Touloukian for $871.71 (724). Schapiro further testified, and produced receipts proving (842, 843; Exs. 41, 42) that Touloukian delivered the rugs to the Schapiro home on December 29th, 1936. Schapiro, shortly after, sent the four rugs to George Silverman in Washington. Even the defendant concedes that the rugs

could not have reached Washington until after January 1, 1937 (Defendant's brief, p. 56).

The defendant admits receiving an oriental rug from Mr. Chambers but alleges that this occurred in the spring of 1936. It was a payment for the rent due the year before opined the defendant, though neither he nor Chambers made any such suggestion (2013). The defendant has not yet produced this rug for inspection by Touloukian, though admittedly it is still in his possession. Finally, while Wadleigh also testified to receiving such a rug from Chambers no attempt was made by the defense to ascertain when that rug was given or whether it was similar to that received by the defendant (1130).

b. The Peterboro Trip.

Mr. Chambers said that on August 10th, 1937 he stayed at the Bleak House in Peterboro, New Hampshire (278) while on a trip with both Hisses, and there saw "She Stoops to Conquer" (279). The journey was to the home of Mr. Harry Dexter White and was to afford Mr. Chambers an opportunity to confer with White. Mr. Chambers said that the Hisses parked their automobile at a bend in the road near the White home but not visible from the house (278).

It was established that in Peterboro on August 10th, 1937, "She Stoops to Conquer" was performed by local players (720-723; Ex. 43). Photographs of the White house demonstrated that because of the juxtaposition of the house and nearby road, a car parked near the house, as recalled by Mr. Chambers, would not be visible from the house (632; Exs. 25, 26). The defendant's leave records with the State Department established that at this time the defendant was absent from his Washington office (745; Ex. 47).

c. The loan of $400.

Mr. Chambers testified that in November 1937, the defendant loaned him $400 in cash which Mr. Chambers gave, with his old car, for a new automobile (263). By way of argument, Mr. Hiss now notes that this loan has not been repaid (Defendant's Brief p. 58).

It was established by testimony (714) and documents that Mr. Chambers purchased an automibile in Randallstown, Maryland, on November 23, 1937, paying $486.75 in cash, with an allowance of $325 on a surrendered vehicle.

The bank account of the Hisses disclosed that on November 19, 1937, four days earlier, the Hisses withdrew $400 in cash (690). Mrs. Hiss alleged that she withdrew this $400 as a separate, distinct fund, with which to purchase additional furnishings for her new home on Volta Place. That her account showed frequent small withdrawals almost immediately after November 19, 1937 meant only that she would rather go to the bank for more household money than touch that separate, distinct fund (2388, 2394).

If this was not enough to make the Hiss explanation incredible, the testimony of Mrs. Tally was. Mrs. Gladys F. Tally was the daughter of the owner of the Volta Place house. She was attempting to lease the house for her mother (3059). On Sunday, December 5th, 1937 she had an advertisement in a Washington newspaper and received several prospective tenants on that day (3060). It was not until a few days after December 5th, almost three weeks after the $400 was withdrawn, that the defendant and his wife came forward as prospective tenants (3061).

No credible explanation of the $400 withdrawal remains but that it was to be the Chambers loan. This was undeniably a reasonable inference for the jury to make.

POINT III

Judge Goddard correctly refused to exclude challenged Government witnesses and testimony.

A. That Inslerman and Rosen were permitted to testify does not constitute reversible error.

1. Felix Inslerman.

Mr. Chambers testified that the defendant furnished him with original state documents and innumerable copies and summaries of secret State Department papers. Mr. Chambers further testified that he carried almost all of this material to Felix Inslerman, who reproduced the information on microfilm (259). Government's Exhibits 11 and 12 (the developed microfilms) were identified by Mr. Chambers as two strips of microfilm prepared by Inslerman and reproducing papers originally supplied by the defendant.

The defendant's attorney, in opening, stated that the papers reproduced in the microfilms came, not from the defendant, but from Henry Julian Wadleigh, a State Department economist (199, 200). In cross examining Mr. Chambers, it was again urged that Wadleigh, not Hiss, supplied the documents reproduced in the microfilms (588).

In the first trial, the defendant's attorney stipulated that if Inslerman were called he would testify that Government's Exhibits 11 and 12 contained pictures of documents given him by Mr. Chambers and that the pictures were made by Inslerman's Leica camera (1059). The Government accepted this stipulation and did not call Inslerman. In the second trial, the defendant's attorneys declined to so stipulate because " * * * we do not have any knowledge about Felix Inslerman * * * " (1059).

In this context, the government called Inslerman. He identified his Leica camera (1257; Ex. 51) and answered numerous other questions. Inslerman refused to state whether he knew Mr. Chambers or photographed papers for him, on the ground that he would thereby incriminate himself. The prosecution, in no way, suggested that Inslerman had any immediate connection with the defendant (1256-1260).

2. William Rosen.

Hiss owned a Ford, which he wished to give to a Communist organizer. Mr. Chambers obtained approval for this unauthorized transaction between a member of the underground and the open Party. Hiss later told Mr. Chambers that the automobile had been given to a party organizer (247).

The certificate of title of a 1929 Ford, registered in the defendant's name, was introduced in evidence. The reverse side of the certificate bore an assignment from the defendant to the Cherner Motor Company on July 23, 1936. The name of the assignee and his own name were admittedly written by defendant (2031). A reassignment on the same day to William Rosen and an application by Rosen for a certificate of title are also contained on the reverse side (773, 774; Ex. 49).

An examination of the invoices of the Cherner Motor Company disclosed that the Company had not received title to the Ford (776, 777). Notwithstanding this, the reassignment to Rosen bears the signatures of two officers of the Cherner Motor Company (777). Finally, a $25 chattel mortgage on the car, allegedly created by the reassignment, was never recorded (1308; Ex. 54).

Hiss' testimony before the HCUA relative to this Ford, disclosed that he "sold" the automobile to Mr. Chambers.

The defendant then modified this to say that he threw the "old, old Ford" in with the 28th Street apartment (2229). The defendant also told the House Committee that he had a new automobile when he gave the Ford to Chambers (1995). This car, a Plymouth, was acquired in August, 1935 (1863), while the apartment transaction occurred in May, 1935. Hence, it was apparent that Hiss lied either in that he had no Plymouth when he transferred the Ford or he did not transfer the Ford at the time he gave Mr. Chambers the apartment.

As a later version, the defendant testified that he promised the Ford to Mr. Chambers in May 1935, and gave him the car in August; that Mr. Chambers left the Ford with defendant (2032), with the ridiculous understanding that defendant should have it ready for Mr. Chambers if at any time he had use for it (2033, 2041); that the Ford was called for by Mr. Chambers sometime before the Hisses moved from P Street on June 15, 1936, more than a month before the assignment to Cherner Motors.

In his opening, the defendant's counsel stated, by way of defense, that the Ford was given to Mr. Chambers as part of the arrangement whereby Mr. Chambers used the Hiss apartment in May and June, 1935 (190).

Immediately after the testimony concerning the assignments to and from the Cherner Motor Company, the prosecution called William Rosen. The prosecution established that Rosen had no immediate contact with the defendant (924). Rosen declined to answer 7 of the 25 questions asked him (922-925).

3. Argument.

The defendant contends that Judge Goddard erred in permitting Inslerman and Rosen to testify when it was probable that they would claim their privilege.* Relative to this issue, there are, in the reports, two opinions of a Texas Court for Criminal Appeals, *Rice* v. *State,* 121 Tex. Crim. Rep. 68, 51 S. W. 2nd 364 (Tex. Crim. App. 1932); *McClure* v. *State,* 95 Tex. Crim. Rep. 53, 251 S. W. 1099 (Tex. Crim. App. 1923), and the following decisions: *Weinbaum* v. *United States,* 9th Cir. Sept. 19, 1950;** *United States* v. *5 Cases,* 179 F. 2d 519, 523 (2nd Cir. 1950); *Bord* v. *United States,* 133 F. 2d 313 (App. D. C. 1942), *cert. denied,* 317 U. S. 671 (1942); *People* v. *Kynette,* 15 Cal. 2nd 731, 104 P. 2d 794 (1940), *cert. denied,* 312 U. S. 703 (1940).

The *McClure* decision is not a precedent here. That criminal conviction was reversed, not because a prosecution witness raised the privilege, but because the prosecutor, in summation, argued at length that the witness' refusal to answer proved the defendant guilty. *McClure* v. *State, supra,* at 56, 251 S. W. 1099, 1102. By other evidence, a close relationship between the witness, the defendant and the crime charged, murder, had been established. Further, in his summation, the prosecutor indirectly referred to the failure of the defendant to testify.

The decision in the *Rice* case, a conspiracy to commit robbery, proceeded from one cause; the lack of evidence. A motion to reargue the reversal dealt with but one issue,

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* Rosen was convicted of contempt for refusing to tell a grand jury how he obtained the Hiss automobile. This conviction was reversed in *Rosen* v. *United States,* 174 F. 2d 187 (2nd Cir. 1949), cert. denied, 338 U. S. 851 (1949) on the ground that Rosen had acted within the privilege against self-incrimination.

** Copies of this unreported opinion have been filed with the Clerk of this Court.

the insufficiency of the evidence. The prosecutor agreed with the court that the government's case was insufficient. *Rice* v. *State, supra,* at 69, 51 S. W. 2nd 365. A companion case, *Bell* v. *State,* 123 Tex. Crim. Rep. 341, 59 S. W. 2d 121 (Tex. Crim. App. 1933) was reversed because the evidence was identical with that of the Rice prosecution and was therefore concluded to be insufficient.

This Court, in *United States* v. *5 Cases,* wrote that it was expressing no opinion as to the effect of a party calling a witness, knowing the witness would claim his privilege. However, the holding was for an affirmance of the judgment. A study of the record in that case establishes that that affirmance is strong precedent for an affirmance of the judgment herein appealed.

The government there sought to have a quantity of cooking oil, owned by the claimant, declared forfeited. It was charged that the oil was adulterated and misbranded in that it was labeled olive oil, which has a natural squalene content, whereas it was peanut oil, with squalene added. By other testimony the government proved that squalene, with anthrilic acid secretly added for purposes of identification, had been sold to Memmoli (pp. 72, 86 of appendix to claimant-appellant's brief). The United States Attorney then called Memmoli.

To the first question Memmoli raised his privilege, stating in the jury's presence, that a criminal prosecution was then pending against him based on the same transactions involved in the libel being tried. Memmoli finally agreed to give his business address but refused to answer the remaining twelve questions asked by the government's attorney. These questions directly suggested that Memmoli was the source of the marked squalene, charged, in the libel, to have been improperly introduced into claimant's product. The government, in the guise of a question,

further suggested to the jury that Memmoli's refusal to answer was prompted by the claimant (pp. 88-93 of appendix to claimant-appellant's brief). Finally, in summation, the government's attorney suggestively referred to this refusal of Memmoli to testify (p. 163 of appendix to claimant-appellant's brief). The judgment for the government was affirmed by this Court.

The Circuit Court of Appeals for the ninth circuit has only recently held that the calling of a witness who might and did raise the privilege is not only not reversible error but does not even constitute a substantial question to authorize the granting of bail pending an appeal. *Weinbaum* v. *United States, supra.*

In *People* v. *Kynette, supra,* the prosecution called three witnesses, all associated with the defendant by other proof. These men had previously announced that they would not testify. When called, they raised the privilege. The Court held that this did not constitute error in the absence of positive proof that the prosecution deliberately and successfully sought to prejudice a defendant. See *Bord* v. *United State, supra.*

As a general proposition, where alleged prejudicial action of a prosecutor is charged as error, a deliberate effort to create and utilize some bias must be shown. See *United States* v. *Grayson,* 166 F. 2d 863, 867 (2nd Cir. 1948); *People* v. *Mundt,* 31 Cal. App. 2d 685, 88 P. 2d 767 (1939). Even where there is such a deliberate effort, reversible error does not result if the actions complained of constitute minor deviations from propriety in a lengthy record, *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 239 (1940), or where, as in the present case, the record contains overwhelming and convincing proof of the defendant's guilt. *United States* v. *Buckner,* 108 F. 2d 921, 928 (2nd Cir. 1940), *cert. denied* 309 U. S. 669 (1940). In the

absence of a definite prejudice to a substantial right the judgment will stand. *United States* v. *Spadafora,* 181 F. 2d 957 (7th Cir. 1950). *See Katteakos* v. *United States,* 328 U. S. 750, 759 (1946); *United States* v. *Antonelli Fireworks Company,* 155 F. 2d 631 (2nd Cir. 1946).

In particular, the two essential ingredients for error are set forth in the *Rice* case:

> "If the State's purpose in putting this witness on the stand was *to compel or invite his refusal to testify,* in order *to use this as an incriminating fact* against appellant, the state was guilty of an injustice" (italics supplied). See also *United States* v. *5 Cases, supra* at 523; *McClure* v. *State, supra,* at 56, 251 S. W. 1102.

To determine the issue here presented, the "setting" of the actions alleged to be error must be appreciated. The purpose of the prosecution was not to compel or invite the refusal of the two witnesses to testify. Inslerman and Rosen were called to the stand for one purpose; to complete, in a logical fashion, the government's case. Each had been cast irretrievably into the path of the Chambers-Hiss relationship by other evidence. Moreover, defendant's trial counsel explicitly stated at the close of Inslerman's testimony that he had not objected to that testimony but would only object to any further information from Inslerman (1260).

Had the government not subpoenaed Rosen and Inslerman, defendant's counsel would undoubtedly have argued that their absence proved the weakness of the prosecution. This very argument was made by the defendant because the government did not call Silverman (4554, 4557) and Bykov (4528), although it was obvious that, if called, these two seasoned Communists would have given no testi-

mony. It is the defendant's position that he may argue for an acquittal if the prosecution fails to call witnesses who would raise the privilege or argue for a reversal if the prosecution does call such witnesses. If that were the law the prosecution would be confronted with a hopeless dilemma.

Is a prosecutor to be forced into not calling a witness who concededly has knowledge for the jury, because the defense repeats a rumor that the witness will claim his privilege? What finite being knows what a witness will do when he is called and the oath has been administered? Consider what havoc could be played in prosecutions if a court would be coerced into rejecting testimony in advance by such a scheme. Even in the instant case, there were reasonable grounds for hoping that a recalcitrant might no longer rely on his Constitutional privilege. Wadleigh first refused to testify before the HCUA and also before the Grand Jury, before he ultimately admitted his guilt. Finally, is the prejudice to arise from the knowledge possessed by the prosecutor that the witness will refuse to answer? There was no prejudice and the probability that the privilege would be raised could not create such prejudice.

In the first trial, a stipulation to Inslerman's testimony was readily accepted by the prosecution. The refusal of Inslerman to testify was never presented to the jury, then, and would not have been presented to the second jury if the defendant had not suddenly lost knowledge of Felix Inslerman.

The prosecution did not use the raising of the privilege as an incriminating fact against the defendant. At no time did the prosecution suggest that Rosen or Inslerman were directly connected with the defendant. To the contrary,

the prosecution established that Rosen did not know the defendant (1156).

The combined testimony of Rosen and Inslerman occupies a total of 9 pages in a record of 3307 pages. They testified for a few minutes in a trial which lasted months.

The prosecution at no time argued, or even suggested, that any inference, hostile to Hiss, should be drawn from the refusal of the witnesses to answer. In summation the defendant's attorney referred to the incidents. He noted that there was no immediate relation between the defendant and the witnesses and expressed his assurance that the jury was not prejudiced thereby (3120). The prosecutor made but the briefest reference to Rosen (3228) and no reference to Inslerman in a lengthy summation of more than 18,000 words.

At the time the privilege was raised Judge Goddard instructed the jury that they were to draw no inference from that fact (925). Judge Goddard repeated this direction in his final charge, in language approved by this Court (3267). *United States* v. *5 Cases, supra,* at page 524. Thus any possible vestige of prejudice was guarded against. *United States* v. *Miller,* 61 F. 2d 947 (2nd Cir. 1933); *United States* v. *Rosenstein,* 34 F. 2d 630, 635 (2nd Cir. 1929), *cert. denied,* 280 U. S. 581 (1929). See *United States* v. *Di Carlo,* 64 F. 2d 15 (2nd Cir. 1933) (charge curing error created by prosecutor's comment on defendant's failure to testify).

Moreover, the record itself establishes that the verdict did not hinge in any way on prejudice, however created. The jury requested the reading of testimony (3278) and the rereading of instructions (3288). That testimony concerned the date of transfer of the Woodstock typewriter from the Hiss residence to the Catlett home (3280). Those instructions defined reasonable doubt, circumstantial evidence and corroborative evidence (3288).

Here was the keystone upon which the case pivoted, *i.e.*, the possession of the Woodstock in February and March 1938, when the Baltimore papers were typed upon it. Here were the pertinent principles of law; the bases upon which the factual issue was to be resolved into a verdict.

That verdict was guilty; that verdict resulted from a determination that the typewriter was possessed by the defendant in the period involved; no prejudice was intended or resulted from the raising of the privilege by Rosen and Inslerman. There was no error.

B. ***The testimony of Inslerman and Webb was relevant.***

As noted above, Mr. Chambers testified that almost all of the state papers received from the defendant were photographed on a Leica, owned by Felix Inslerman. Inslerman testified that Exhibit 51 was his Leica camera, which he had purchased in Washington in 1937. Qualified as an expert in photography, Frederick Webb testified that the microfilms (Exs. 11 and 12) had been made on Inslerman's camera. Webb produced photomicrographs to support his testimony (Exs. 52, 53).

The defendant contends that this testimony of Inslerman and Webb was totally irrelevant and therefore inadmissible. As an alternative theory, it is argued that even if relevant it was too prejudicial and should, therefore, have been excluded by Judge Goddard.

It is well settled that a trial court's ruling on a disputed question of relevancy will not be upset in the absence of a gross misjudgment. *See United States* v. *Grayson,* 166 F. 2d 863, 870 (2nd Cir. 1948); *United States* v. *Pugliese,* 153 F. 2d 497 (2nd Cir. 1945). As an administrative necessity, the trial judge is given broad discretion in ruling on the innumerable objections of a lengthy trial challenging the logical setting of some proffered proof.

The evidence here concerned was inescapably relevant to two prime issues, *i.e.*, the giving of State Papers to Mr. Chambers by the defendant, and the credibility of Mr. Chambers. Inslerman and Webb corroborated Mr. Chambers as to the means whereby the State Papers were photographed. The content of the microfilms corroborated Mr. Chambers as to the source of the underlying State Papers. Each element was essential and necessarily independent. That any part of this proof militated against the defendant did not render that part inadmissible.

As his sole rebuttal the defendant alleges that he did not dispute the photographing of papers by Inslerman for Mr. Chambers. Therefore, it is argued, the prosecution should have been foreclosed from proving these facts. But as a party the government was entitled to prove its entire case whether or not a particular element of that case was specifically disputed by the defendant or not.

In any event, the alleged absence of dispute is not borne out by the record. By his plea and by his vicious attempts to impeach the credibility of Whittaker Chambers, the defendant challenged all of the Chambers testimony. Moreover, the defendant by "losing" all knowledge of Inslerman, rendered Inslerman's testifying necessary. The testimony of Inslerman and Webb was all too relevant and was properly admitted into evidence by Judge Goddard.

C. *The testimony of Mrs. Hede Massing was competent and relevant.*

The indictment charged that the defendant gave State Papers to, and associated with, a Communist spy. The defendant denied that he had ever been a member of, or worker for, the communist organization. This denial was made time and again before the second trial and was indisputably to be the defense position.

At the first trial, the prosecution attempted to call Mrs. Hede Massing as a rebuttal witness. She was excluded on two grounds: (1) she should have been called in the direct case, and (2) because of the then current publicity concerning her fugitive former husband, Gerhardt Eisler. Neither ground being available at the later second trial when she was called on the direct case, Judge Goddard permitted Mrs. Massing to testify.

In 1935 Mrs. Massing, an admitted former Communist spy, met the defendant at the home of the Noel Fields. This couple later disappeared behind the Communist borders. At this 1935 meeting, Mrs. Massing and the defendant quarreled, in a friendly manner, Mrs. Massing desiring Field's espionage services while Hiss wished to retain Field in his Communist spy group. Both Massing and Hiss agreed that, in either event, they would be toiling for the same ultimate leader (1266).

The defendant notes that Mrs. Massing testified to her marriage to Eisler, which was prejudicial (Defendant's Brief, p. 91). The defendant fails to note that this testimony resulted from a vicious comment by his attorney who then announced that he would " * * * bring out the matter later" (1263).

Two arguments are advanced to support the conclusion that the testimony of Mrs. Massing should have been stricken: (a) her " * * * credibility was badly shaken", and (b) her testimony was vague (Defendant's Brief, p. 91).

As to the first proposition, the defendant had full opportunity to cross-examine Mrs. Massing. The weight to be given to Mrs. Massing's testimony and her credibility as a witness were for the jurors to determine and they were so instructed. *United States* v. *Fleenor,* 162 F. 2d 935 (7th Cir. 1947); *Cheffey* v. *Pennsylvania R. Co.,* 79 F. Supp. 252, 260 (E. D. Pa. 1948) (3268).

As to the argument on vagueness, this is refuted by the record. The testimony of Mrs. Massing was only too clear: the defendant was working for and with a communist group.

D. ***The testimony of Mrs. Edith Murray was proper rebuttal.***

The defendant testified that he broke with Mr. Chambers in the spring of 1936 and did not see Mr. or Mrs. Chambers after that time (1869). He further testified that, aside from the 28th Street apartment, he had never visited the Chambers' home (1853)..

Mrs. Hiss, a witness for the defendant, denied seeing Mr. or Mrs. Chambers at their Eutaw Place residence in 1936. Mrs. Hiss was given more than one opportunity by the Government to correct her testimony in this regard. She declined to do so (2381, 2414, 2423).

As a rebuttal witness the Government called Mrs. Edith Murray. She testified to serving a Cantwell family on Eutaw Place, Baltimore, in 1936 (3023, 3028). She identified Mr. and Mrs. Chambers as the Cantwells, they having used the pseudonym "Cantwell" at that time.

Mrs. Murray identified Mrs. Hiss as a frequent visitor at the Eutaw Place apartment in the spring of 1936 (3025). Mrs. Murray testified that Mr. Hiss accompanied his wife on one such visit (3026). On another occasion, Mrs. Hiss stayed the night to care for the Chambers' child while Mrs. Chambers went to New York for medical care, relative to her then-expected second child (3025). Testimony of this event corroborated the earlier testimony of Mrs. Chambers.

On cross-examination, the defendant's attorney developed in detail the extreme precautions taken by the prosecution to avoid any serious contention that Mrs. Murray

was coerced or influenced into testifying as she did. Mrs. Murray was not even told of the trial. She did not know the Chambers until asked to identify them as the Cantwells. She was brought to New York, placed in a crowded room and asked to point out the defendant and his wife (3032-3033). What further precautions could have been taken? The defendant suggests none.

The sole legal complaint with regard to the testimony of Mrs. Murray is that she should have been called in the Government's direct case (Defendant's brief, p. 93). But Mrs. Murray's testimony was by its very nature rebuttal. 6 Wigmore, Evidence (3rd ed. 1940) §1873. See *United States* v. *Novick*, 124 F. 2d 107, 109 (2nd Cir. 1941), *cert. denied*, 315 U. S. 813 (1942). Mrs. Hiss was asked if she visited the Chambers at their Eutaw Place apartment in 1936. She answered in the negative. Mr. Hiss gave substantially the same testimony.

With this as a foundation, the Government was entitled to introduce impeaching testimony on the issue. *Conrad* v. *Griffey*, 57 U. S. 38 (1853); *Evans* v. *United States*, 122 F. 2d 461 (10th Cir. 1941), *cert. denied*, 314 U. S. 698 (1941). Mrs. Murray could effect this impeachment only as a rebuttal witness. She was necessarily called as such. Moreover, assuming *arguendo* that Mrs. Murray might more properly have been called in the direct case, the decision to receive her testimony as rebuttal was well within the discretion of the trial court. *United States* v. *Abdallah*, 149 F. 2d 219, 223 (2nd Cir. 1945), *cert. denied*, 326 U. S. 724 (1945).

The defendant subtly contends that it was reversible error for the Government to call Mrs. Murray on the last day of testimony. Not to enable the defendant and his—at that time nine, now twelve—attorneys and investigators

to prepare an explanation of the Murray testimony was fatally improper. The defendant offers no authorities for this proposition and we know of none.

E. ***The testimony of John Foster Dulles was correctly submitted to the jury.***

Mr. Dulles, as a trustee of the Carnegie Foundation, had been called on stage by the testimony of Hiss. Hiss gave a version of his entrance into the Carnegie Foundation (1904), of Mr. Dulles' handling of an early report that Hiss was a communist (1906), of Hiss' resignation (1931), and of Hiss' report to Dulles after testifying before the Grand Jury (2071). The version was highly complimentary to Hiss.

Mr. Dulles was called. He disagreed with each and every important aspect of the Hiss recital (3071-3077). He served to give the true picture of what occurred, a picture clearly relevant to the principal charge. He further served to impeach the testimony of the defendant. Hence, on two distinct and independent grounds the testimony of Mr. Dulles was admissible. *United States* v. *Ryan,* 58 F. 2d 711 (7th Cir. 1932); *Halbert* v. *United States,* 290 Fed. 765 (6th Cir. 1923); 3 Wigmore, Evidence (3rd ed. 1940) §1005. See *United States* v. *Buckner,* 108 F. 2d 921 (2nd Cir. 1940), *cert. denied,* 309 U. S. 669 (1940). To hear him as a rebuttal witness was not an abuse of Judge Goddard's authority to determine the order of proof.

POINT IV

Arguments based on isolated questions of the prosecutor and his summation are extraordinary contentions to present for the first time on appeal. Each is obviously frivolous.

Defendant contends that the prosecutor acted and spoke in so prejudicial a manner that his conviction for perjury should be reversed, although, concededly, no objection to any such alleged improprieties was made (Defendant's brief, p. 97). Hence, in the face of the overwhelming proof of guilt in this record the defendant has the additional burden of establishing that the alleged prejudicial misconduct was plainly erroneous and seriously violated some substantial right. *United States* v. *Spadafora,* 181 F. 2d 957 (7th Cir. 1950). Moreover, this prejudice must have continued into the jury's deliberations, despite the explicit instructions of Judge Goddard that the jurors were to disregard the arguments of counsel (3267) and to reach their verdict on the basis of their own recollection of the evidence (3268, 3270). No such prejudicial conduct or argument occurred. The contentions now raised are plainly afterthoughts and extraordinary contentions to present for the first time on appeal. *United States* v. *Hefler,* 159 F. 2d 831, 833 (2nd Cir. 1947), *cert. denied,* 331 U. S. 811 (1947).

Complaint is made that the prosecutor referred to the Grand Jury and its return of the indictment against the defendant. It is not contended, nor is it the fact, that any remark of the prosecutor in this regard was contrary to the truth. Both in his opening (166) and in his summation (3219), the attorney for the government was most careful to note that the indictment was merely a charge which had

to be proved. Judge Goddard charged the jury at length that the indictment was a charge and nothing more (3264). This was even as the defendant had requested (3188). There was no error.

The government's attorney asked Mrs. Chambers when she had last seen him. This question had the obvious purpose of establishing that the prosecutor had not coached Mrs. Chambers to testify in a desired fashion. Mrs. Chambers answered that she last saw the prosecutor when he came to the Chambers' farm. She very naturally stated the occasion, *viz.* " * * * when you came to talk to him (Mr. Chambers) about the lie-detector" (960). On cross-examination, Mr. Hiss stated that he had declined to take a lie-detector test. The prosecutor then read the defendant's explanation to the HCUA that his refusal was due to serious doubts about the reliability of such tests (2211, 2212). The defendant sees reversible error here.

The testimony of Mrs. Chambers was volunteered and innocuous. There was no statement that Mr. Chambers desired to or would undergo a lie-detector test. The refusal by the defendant logically bore on his credibility and was permissible cross-examination. Any possibility of misrepresenting the defendant's position was carefully avoided by the government's attorney who immediately read the defendant's explanation of his position.

Two witnesses, Mrs. Massing and Mr. Chambers testified that the defendant was a spy for the Communist organization. In his opening and summation, the prosecutor suggested that the defendant, by his libel suit, convinced Mr. Chambers that standard Communist tactics were being applied. The prosecutor linked these facts with the defense's repeated attacks on the F. B. I., as an organization which creates false evidence and suborns perjury, as proof that the defendant was conforming to the Party

line (see *e.g.* 3113, 3114, 3124, 3130, 3131). That these actions of the defendant do conform to what is recognized Communist tactics, is not denied by the defendant. No objection was made during the trial, hence any sound complaint is lost. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239 (1940); *United States* v. *Skidmore*, 123 F. 2d 604 (7th Cir. 1941), *cert. denied*, 315 U. S. 800 (1941). The instances cited constitute isolated arguments of counsel in a long and hard fought criminal trial and are within the scope of permissible comment. *Shushan* v. *United States*, 117 F. 2d 110, 118 (5th Cir. 1941), *cert. denied*, 313 U. S. 574 (1941). Finally, the statements defending the F. B. I. were more than justified by the unsubstantiated and insinuating charges of the defendant's attorney. *Baker* v. *United States*, 115 F. 2d 533 (8th Cir. 1940), *cert. denied*, 312 U. S. 692 (1940).

In October, 1949 the defense wrote the State Department concerning a passport application made by Mr. Chambers in the 1930's under the alias of David Breen. This application was subsequently made available to the defense before the second trial. Mr. Chambers testified for the first time at the second trial that he did apply in 1935 for such a passport. Before this testimony, only Mr. Chambers, the defendant, and, of course, their communist superiors knew of the intended Breen trip (249). It was obviously pertinent, therefore, for the jury to be told the source of the defendant's information which resulted in the letter of October 1949 to the State Department.

Desiring to present all the circumstances to the jury, the prosecutor asked Mr. Hiss whence he learned of the Breen application. The reply was that someone had given the "tip" to one of the defense attorneys, Mr. Rosenwald, who was then seated at the defense table (2062-2064). After the

following recess the prosecutor asked the defendant if he had ascertained the identity of the very important "tipster". The answer was in the negative (2065). Following the next recess, Mr. Hiss again said he had not learned who the tipster was (2125).

Mr. Rosenwald, present daily at the defense table, never came forward. Hence, if this circumstance was innocent, the defense did everything in its power to make it appear otherwise. Certainly, reference in summation to the still unidentified informer does not constitute reversible error (3240, 3250). *United States* v. *Beekman,* 155 F. 2d 580, 584 (2nd Cir. 1946).

In summation, the prosecutor argued that the evidence concerning the gift of the rug substantiated Mr. Chambers' testimony on Count II. The failure of the defendant to produce the rug, admittedly in his possession, was suggested as an indication of guilt. To contend that this was other than proper summation is without substance. *Kempe* v. *United States,* 160 F. 2d 406, 411 (8th Cir. 1947), *cert. denied,* 331 U. S. 843 (1947).

The defendant next complains about the government's examination of five of his twenty-three character witnesses.

Mr. Jessup was asked if he had ever met Jacob Aranoff (1158). He answered in the negative. This is error, argues the defendant, because Aranoff is a Russian name (Defendant's brief, p. 105). Further error was committed, contends the defendant, because Dr. Jessup was questioned concerning his and his wife's association with specified organizations. No objection was made by the defendant. No ground for objection existed for these questions were obviously permissible in the cross examination of a character witness. *United States* v. *Michelson,* 165 F. 2d 732 (2nd Cir. 1948), affirmed, 335 U. S. 469 (1948).

Mr. Sayre was asked if the defendant had any part in obtaining Mr. Sayre's present employment with the United Nations (1515). Mr. Sayre answered that he had spoken with Hiss on the subject of employment with the U. N. (1515). Mr. Sayre would not deny having said that Hiss worked behind the scenes to help him secure a U. N. post (1516). In this context, the line of questioning now attacked was clearly proper to establish that Mr. Sayre had good reason to favor the defendant.

Mr. Eichelberger expressed an exalted opinion of the defendant's character. To aid in evaluating this opinion, the government inquired if the witness had been associated with certain organizations. Mr. Eichelberger denied any association with the organizations and this ended the inquiry. No error was committed by the asking of these questions which were not objected to by the defense.

The defendant attacks several questions and comments which are so innocuous that mere mention will dispose of them. Admiral Hepburn was asked if he had ever been a member of an Annapolis clique known as the Green Bowl Society (2274). The defendant was asked if a number of checks payable to Magruder referred to Judge Magruder, a previous character witness (2095). A humorous comment was made (3216) concerning the testimony of Judge Wyzanski that the defendant's reputation "was the equal of that of anybody I have ever known" (2124). It is obvious that there is no error here and extended comment will, therefore, not be made.

Argument is made that the prosecutor committed reversible error by objecting in open court to the testimony of the psychiatrist and the psychologist. This is indeed new doctrine. At the risk of belaboring the obvious, the Government here notes that it has the right to object publicly to any question or witness believed to be objectionable.

See *Baker* v. *United States, supra,* at 542. Similarly, in summation, it was permissible to argue that there was no need to refute the psychiatric testimony (3218, 3219). *Mellor* v. *United States,* 160 F. 2d 757, 765 (8th Cir. 1947), *cert. denied,* 331 U. S. 848 (1947). Indeed, this was the fact.

In summation the prosecutor noted that there were some common typing errors in the Baltimore Papers and the specimens of typing from the Woodstock typewriter. This was nothing more than a recital of something in evidence. The jury could examine these exhibits if it saw fit. *Buckner* v. *United States,* 154 F. 2d 317 (App. D. C. 1946); *Silkworth* v. *United States,* 10 F. 2d 711, 721 (2nd Cir. 1926), *cert. denied,* 271 U. S. 664 (1926). As in analogous situations, the jurors after personal examination of exhibits could give to such proof the weight they considered fitting. *United States* v. *Chamberlain,* Fed. Cas. No. 14,778 (C. C. S. D. 1874) (common spelling errors in handwriting); *Stokes* v. *United States,* 157 U. S. 187, 193 (1895). *In re Goldberg,* 91 F. 2d 996, 997 (2nd Cir. 1937) (comparison of handwriting); *Ledford* v. *United States,* 155 F. 2d 574, 576 (6th Cir. 1946) *cert. denied,* 329 U. S. 733 (1946) (examination of allegedly forged ballots). That this evidence did not conclusively prove Mrs. Hiss to be the typist of the Baltimore papers does not mean that it could not be submitted and considered by the jury.

There was testimony, some of which was demanded by the defendant (463), that Hiss had been associated in Washington with Lee Pressman, John Abt and Nathan Witt. These three men were described by Mr. Chambers as active members of the Communist Organization. The defendant was given full opportunity to state his version of his relationship with these men. Finally, the jury was carefully instructed that they were to arrive at their verdict on

the basis of the evidence of guilt only, which had to satisfy each of them beyond a reasonable doubt (3264).

The prosecutor argued that these three men were not called because he " * * * had a file * * * " on them (3240). This is error, contends the defendant, because the prosecutor thereby inferred that he had information which would incriminate the defendant. This inference is more than strained. The argument obviously was that the government would be able to effectively cross examine Pressman, Witt and Abt. This was clearly within the area of permissible argument.

There was comment by the prosecutor in summation that potential witnesses, available to the defendant, had not been called (3239, 3240). This was permissible comment by an attorney. *United States* v. *Beekman, supra,* at page 584. Moreover, it was more than justified by the repeated statements in the defense summation that the government had failed to call numerous witnesses because said witnesses would have destroyed the prosecution (*e.g.,* 3105, 3122, 3123). *Himmelfort* v. *United States,* 175 F. 2d 924, 929 (9th Cir. 1949), *cert. denied,* 338 U. S. 860 (1949).

Finally, there is an enumeration of instances wherein the government's attorney argues either that some aspect of the defendant's defense was contrary to the fact and fabricated or that the government's case was well established (Defendant's brief. p. 113). That such conduct is not only permissible but, indeed, demanded on the part of the prosecutor is well established. *United States* v. *Holt,* 108 F. 2d 365, 369 (7th Cir. 1940) *cert. denied,* 309 U. S. 672 (1940); *Mellor* v. *United States, supra.*

The conduct and arguments of the prosecutor were in no respect improper or unduly prejudicial. There is no error.

POINT V

Judge Goddard's charge and his supplemental instructions were correct.

A. *The charge.*

The defendant in the guise of legal argument indulges in improper attacks against Judge Goddard's charge. In no uncertain terms, Hiss charges that Judge Goddard's " * * * instructions to the jury were weighted in favor of the Government and against appellant." This accusation of prejudicial and improper conduct by Judge Goddard is repeated by defendant as alleged argument (Defendant's Brief, p. 114).

Augmenting this allegation that Judge Goddard weighted his instructions to favor the prosecution, the defendant extracts excerpts from these instructions which did not satisfy him. Hence, by way of prelude it is noted that requests to charge need not be adopted verbatim by the court. If the court's instructions expound the pertinent law accurately, there is no error. *United States* v. *Minkoff,* 137 F. 2d 402 (2nd Cir. 1943). Moreover, the court need not charge at length concerning the evidence presented, particularly where the proof has covered many days of court.

The defendant makes strong complaint that " * * * portions of the charge on reasonable doubt favorable to defendant or of neutral effect (3265, 3266) were followed immediately by instructions unfavorable to him (3265-3266)." It is not the government's understanding that the criterion for a charge on reasonable doubt is its "favorableness" to the defendant. Judge Goddard correctly defined reasonable doubt for the jury. *United States* v. *Minuse,* 142 F. 2d 338

(2nd Cir. 1944), *cert. denied,* 323 U. S. 716 (1944). His charge was more than fair to the defendant.

On character evidence, Judge Goddard charged the jury:

> "Evidence of good character may, in itself, create a reasonable doubt where, without such evidence, no reasonable doubt would exist" (3266).

Certainly, even the defendant could ask for no more favorable charge on this proposition of law. This was precisely the request to charge made by his attorneys (3192-3193). Now, the defendant argues that this instruction was prejudicial to him because the Court later said that the jury might disregard the good character testimony if it saw fit. This is coupled with the novel contention that arguments of the prosecutor, belittling the good character evidence, resulted in the Court's instructions being erroneous. Suffice to say, the Court's charge was correct, *Edgington* v. *United States,* 164 U. S. 361, 366 (1896), while the comments of the prosecutor were within the scope of proper argument. *Ladrey* v. *United States,* 155 F. 2d 417 (App. D. C. 1946), *cert. denied,* 329 U. S. 723 (1946); *Moore* v. *United States,* 132 F. 2d 47 (5th Cir. 1942), *cert. denied,* 317 U. S. 784 (1943).

Judge Goddard instructed the jury that they alone were to determine the credibility of Mr. Chambers; that in determining his credibility the jurors were to be mindful that Mr. Chambers had a "deep interest" in the result of the prosecution. The court referred to the defendant's libel action and stated that the result of the prosecution might affect that suit (3269). Judge Goddard instructed the jury further that they could give whatever weight they saw fit to the psychiatric testimony attacking the credibility of Mr. Chambers. Finally, he charged that the jurors were

compelled to acquit the defendant if they did not believe Mr. Chambers beyond a reasonable doubt.

The defendant requested a charge that all the proof concerning Mr. Chambers' past life be considered in determining his credibility (3181). This was done. He further requested that the jury be charged that Mr. Chambers' testimony be viewed with suspicion (3192). Judge Goddard declined to do so. This ruling was correct. No request was made that Mr. Chambers be considered an accomplice in evaluating his testimony (Defendant's Brief, p. 117). Under Federal Practice, the defendant was not entitled to such a charge. *United States* v. *Wilson, supra.* Moreover, Mr. Chambers was not the defendant's accomplice in the crime charged, perjury. See *United States* v. *Seavey, supra.* There was no error in the instructions dealing with the credibility of Whittaker Chambers.

Defendant's complaint with regard to Judge Goddard's instructions on the psychiatric testimony hardly merits comment. In his request 6A, Hiss included the following: "You may give that (the psychiatric) testimony such weight as you consider proper" (3181). This is precisely what Judge Goddard said to the jury (3270). The complaint now made is that all possible conclusions favorable to the defendant, which could be reached from the testimony of the two doctors, were not articulated by the Court. This course is patently unfeasible and is not required by any decision.

As his next theory, the defendant suggests that Judge Goddard erred in not summarizing the evidence in detail when instructing the jury in regard to circumstantial evidence and corroborative proof. It is not contended that the language used to define these two terms was erroneous. The charge on corroboration was correct. *United States* v. *Weiler, supra.* The jury was instructed

that they must be satisfied beyond a reasonable doubt that the circumstantial proof was inconsistent with the innocence of the defendant (3274). This properly expounded the law. *Thompson* v. *United States,* 145 F. 2d 826 (5th Cir. 1944), *cert. denied,* 324 U. S. 861 (1945). Judge Goddard properly left to the jury the determination of the fact-issues. *Price* v. *United States,* 276 Fed. 628, 630 (App. D. C. 1921). See *Morris* v. *United States,* 156 F. 2d 525, 528 (9th Cir. 1946).

The contention is made that Judge Goddard prejudiced the defendant by incorrectly stating the evidence. In fact, Judge Goddard scrupulously avoided any indication of his own persuasions. He explicitly stated that he expressed no opinion on the evidence (3268). He charged the jury that their recollection of the proof was to be determinative and that any statement of the evidence by counsel or court was in no sense binding upon them. There was no error. *United States* v. *Michelson,* 165 F. 2d 732, 735 (2nd Cir. 1948), affirmed, 335 U. S. 469 (1948); *Johnson* v. *United States,* 126 F. 2d 242, 250 (8th Cir. 1942).

Mrs. Chambers testified to meetings of her husband and the defendant which occurred after January 1, 1937. Mr. Chambers testified to such meetings, one of which was also reported by Mrs. Chambers. Judge Goddard charged the jurors that they might return a verdict of guilty of Count II if they were satisfied beyond a reasonable doubt that Mr. and Mrs. Chambers testified truthfully about the same meeting in 1937 (3273). This was more than the defendant was entitled to by the decisions. *United States* v. *Seavey, supra.*

Finally, one paragraph of the lengthy charge is torn from the context and charged to be error because there is not included therein a complete explanation of reasonable doubt and corroboration. These subjects were ade-

quately covered on the instructions. The Court is not compelled to repeat the information in every paragraph, but rather the entire charge must be read as one statement. *Baker* v. *United States, supra,* at page 54. Moreover, since no objection was made no error of harmless omission can now be raised. *Felton* v. *United States,* 170 F. 2d 153 (App. D. C. 1948), *cert. denied,* 335 U. S. 831 (1948); *United States* v. *Vasilaky,* 168 F. 2d 191 (2nd Cir. 1948). Rule 30, Federal Criminal Rules.

B. *The supplemental instructions.*

After retiring to deliberate, the jury returned and submitted the following request to the Court (3288):

> "Your Honor, without reading the entire charge, will you please *define* the following: reasonable doubt; circumstantial evidence, acceptable corroborative evidence and their relation to each other." (Italics supplied.)

Judge Goddard complied with this request in the precise fashion in which he conducted the entire trial. He reread those portions of his charge which defined the terms specified. No objection was made by the defendant (3291). The jurors indicated that this was the information they desired (3291).

Thirty minutes later, the defendant's counsel requested the Court to reread these portions of the original charge: (1) the weight to be given character evidence, (2) the sentence of the original charge at folio 3274 reading, "This is an issue to be determined by you", (3) a paragraph from the original charge stating that if the jurors did not believe Mr. Chambers they must acquit (3274).

At this point, the defendant again charges that Judge Goddard weighed his instructions to prejudice him (123). However, even the defendant does not allege that the three excerpts requested by him were within the jury's request for definitions. The excerpts obviously were not. Judge Goddard correctly redefined the terms specified by the jury. There was no error. See *Dorsey* v. *United States,* 174 F. 2d 899, 902 (5th Cir. 1949); *C. I. T. Corporation* v. *United States,* 150 F. 2d 85, 90 (9th Cir. 1945); *United States* v. *Compagna,* 146 F. 2d 524 (2nd Cir. 1944), *cert. denied,* 324 U. S. 867 (1945).

Finally, the defendant charges that Judge Goddard committed reversible error in his supplemental instructions when he stated that the government contended it had substantiated Mr. Chambers' testimony by other proof (3291). But this was obviously the government's position. The jury was aware of that fact. The prosecution so stated in its opening and countless times during the trial and lastly in summation. Judge Goddard did nothing more than express knowledge known to all. To suggest that this statement caused the verdict of guilty is without substance.

POINT VI

Judge Goddard's denials of the defendant's motions to dismiss the indictment and to arrest the judgment were correct.

The sole argument discernible in the defendant's brief on this issue is that this perjury prosecution was barred by the Statute of Limitations. This conclusion flows, it is argued, from the circumstance that the perjurious testimony was related to espionage activities of the defendant now immune to criminal prosecution because of the limitations statute.

This contention was dismissed by Judge Bondy, when raised on a pretrial motion. When suggested to Judge Samuel Kaufman during the first trial, Judge Kaufman dismissed the argument with the following language:

> "I don't think there is any substance to that, Mr. Stryker." (P. 1427 of record of first trial.)

In essence, the defendant contends that a witness cannot commit perjury when he testifies about any past criminal activities without the period of limitation, regardless of how false his testimony may be. No precedent has been offered for this startling proposition. None exists for it is patently absurd.

The defendant was not prosecuted for espionage. If he had refused to answer the questions of the grand jury, the matter would have been there terminated. If he had answered truthfully, no valid indictment could have been returned.

The defendant was indicted and prosecuted for falsely answering two questions asked him by the Grand Jury. The indictment was returned within three years of the crime. The prosecution is, therefore, not barred by the Statute of Limitations.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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RECORD PRESS — N. Y. C.

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

ALGER HISS,

Appellant.

BRIEF FOR APPELLANT

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United States Court of Appeals

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BRIEF FOR APPELLANT

Introductory Statement

This is an appeal from a judgment of Honorable Henry W. Goddard, United States District Judge, entered January 25, 1950, on conviction of appellant by a jury on January 21 on both counts of an indictment charging perjury.

The indictment was returned on December 15, 1948. A trial was held before Honorable Samuel H. Kaufman, beginning May 31, 1949. The case was submitted to the jury at 4:20 P. M. on July 7 (T. 1st Tr. 2941).* The jury finally reported at 8:58 P. M. on July 8 that it was unable to reach a verdict; and it was discharged (T. 1st Tr. 2963).

The first trial was accompanied and followed by wide publicity, including (during and after the trial) attacks on the trial judge and character witnesses who had appeared for appellant, and (after the trial) on jurors who had voted for acquittal (R. 94-5, 98-105, 127-30); and some of these jurors were otherwise harassed (R. 113-24). Setting

* References herein to pages of the stenographic transcript of the first trial will be so indicated.

forth these circumstances, appellant moved for a change of venue (R. 93). The motion was denied (R. 141).*

The present trial began on November 17, 1949. The case was submitted to the jury at 3:10 P. M. on January 20, 1950 (R. 3277). After deliberation until 10:45 P. M. on January 20, and from 10 A. M. on January 21, the jury returned a verdict of guilty on both counts of the indictment at 2:47 P. M. on January 21, 1950 (R. 3287, 3294).

This case had its origin in a charge of membership in an underground group in the Communist Party made against appellant by one Whittaker Chambers before the Committee on Un-American Activities of the House of Representatives on August 3, 1948 (R. 598-600; House Committee Hearings, pp. 563 *et seq.*).** Appellant denied these charges under oath (House Committee Hearings, pp. 642 *et seq.*), and challenged Chambers to repeat his charges where they would not be privileged against suit for libel (R. 1892-3; House Committee Hearings, pp. 988-9). Chambers having so repeated these charges, appellant on September 27, 1948, brought suit for libel against him in the United States District Court for the District of Maryland (R. 2448); and on November 4, 1948, commenced in that suit a pre-trial examination of Chambers (R. 2449), in the course of which Mrs. Chambers was also examined.

Meanwhile, on October 14 and 15, 1948, Chambers had testified before the Grand Jury for the Southern District of New York (R. 346), and in that testimony denied any knowledge of espionage or of anyone in the employ of the Government furnishing information (R. 296, 347-52); this being also the substance of his previous testimony before the House Committee (R. 296, 354-5).

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*Appellant is not appealing from the denial of this motion, recognizing that the District Court had wide discretion with respect thereto. The relevance to this appeal of the circumstances shown in the record on that motion will be developed in Point III.

**The reference "House Committee Hearings" is to a public document, "Hearings Regarding Communist Espionage in the United States Government", Hearings Before the Committee on Un-American Activities, House of Representatives, Eightieth Congress, Second Session (U. S. Government Printing Office, Washington, 1948). References are for the limited purpose of showing the statements made at such hearings, not for the truth of the content of such statements.

In his pre-trial examination in the Maryland action, Chambers was asked by appellant's attorneys to produce any papers that he might have received from appellant (R. 290). On November 17, after an interval of some days, Chambers produced four pencil memoranda in appellant's handwriting and 43 typewritten documents all but one of which it has been conceded for the purposes of this trial were typed on a Woodstock typewriter once owned by appellant and his wife (Gov. Balt. Exs. 1-4, 5-47).* Each of these pencil memoranda and typewritten documents is either a copy of or excerpt from, or a summary or paraphrase of all or part of, one or more official State Department documents (Gov. St. Exs. 1-47).**

Upon the production of Government's Baltimore Exhibits 1-47, appellant's attorneys, on his instructions, immediately turned these documents over to the Department of Justice (R. 1895-6, 2251, 2450-3).

On December 2, 1948, Chambers delivered to agents of the House Committee two rolls of developed microfilm which he had hidden in a hollowed-out pumpkin (R. 707-14; Gov. Exs. 11, 12).*** The microfilm consists of 58 frames, each frame being a copy of a page of a State Department document. Enlargements of these frames, with pages grouped to make up whole documents, have been marked Government's Baltimore Exhibits 48 and 50-55,**** having been introduced at a later session of the pre-trial examination in the Maryland action (that examination having been resumed after the indictment by order of Judge Chesnut [R. 2454-5; Gov. Ex. 62]).

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* For convenience at this trial, these exhibits (and seven others hereafter referred to) were marked "Government's Baltimore Exhibits", with the numbers with which they had been marked in the pre-trial examination in the Maryland action, and without interruption of the numerical sequence of the regular Government's Exhibits.

** The State Department documents related to the Government's Baltimore Exhibits were marked at this trial as "Government's State Exhibits", with numbers corresponding to the numbers of the Government's Baltimore Exhibits to which they related.

*** He delivered at the same time three rolls of undeveloped microfilm which have not been introduced in evidence in this case.

**** There is no Government's Baltimore Exhibit 49 (and no Government's State Exhibit 49), because in the Maryland action this exhibit number was used for an unrelated exhibit.

Chambers' production of Baltimore Exhibits 1-47 and Government's Exhibits 11 and 12 resulted in further testimony by him before the House Committee on December 6, 1948, the transcript of which has never been published by the Committee (except that an extract therefrom, read into the Committee's examination of Henry Julian Wadleigh, was published in the publication of Wadleigh's House Committee testimony). It resulted further in Chambers being recalled, and appellant being called, before the Grand Jury of the Southern District of New York. On the last day of the Grand Jury's term, December 15, 1948, appellant gave the testimony on which the indictment is founded. The indictment is set forth at R. 2-5.

Grounds of Appeal

The grounds on which appellant seeks reversal of the judgment of conviction are:

1. There was insufficient evidence to support a conviction, under the law applicable in perjury cases, and appellant's motion for judgment of acquittal should have been granted (Point I).

2. The Court erred in construing the second count of the indictment to permit the jury to convict on finding that there were meetings between appellant and Chambers after January 1, 1937, but at times other than "in or about the months of February and March, 1938", or meetings in that 1938 period other than on the occasions of the alleged deliveries of documents by appellant to Chambers (Point II).

3. There was error in allowing a witness who it was known would claim the privilege against self-incrimination to take the stand, in the admission of evidence, and in the denial of motions to strike the testimony of several witnesses including a witness in rebuttal whose testimony should have been admitted only on the Government's main case (Point IV).

4. Appellant was deprived of a fair trial by prejudicial action of the prosecutor (Point V).

5. The Court erred in its instructions to the jury (Point VI).

6. The Court erred in its supplemental instructions (Point VII).

7. The Court erred in denying appellant's motions to dismiss the indictment and to arrest the judgment (Point VIII).

We shall discuss also (in Point III) grounds for concluding that the errors discussed in Points IV to VII were not "harmless."

General Background Facts

To avoid undue interruption in the following discussion, it is necessary to state here certain background facts (undisputed except as indicated).

Facts regarding appellant: Appellant was born November 11, 1904, at Baltimore. He graduated from the Harvard Law School in 1929. From the fall of 1930 to the spring of 1933, when he moved to Washington, he was associated with law firms in Boston and New York. From May, 1933, to April, 1935, he served with the Agricultural Adjustment Administration. During the latter part of that period his services were lent to the Senate Committee Investigating the Munitions Industry (the so-called Nye Committee) as its counsel; and this service continued until, on August 15, 1935, he entered the office of the Solicitor General. He continued in the Solicitor General's office until September 1, 1936, when he entered the State Department. From that date until September 1, 1939, he served as assistant to Assistant Secretary of State Francis B. Sayre; from September 1, 1939, to May 1, 1944, as assistant to Stanley K. Hornbeck (first Adviser on Political Relations and later Director, Office of Far Eastern Affairs); and from May 1, 1944, to January 15, 1947, in the Office of Special Political Affairs, of which he became Director on March 19, 1945. On February 1, 1947, he became President of the Carnegie Endowment for International Peace, a

position which he held until May, 1949 (having been on leave of absence from December 13, 1948).

Appellant was married on December 11, 1929, to Priscilla Fansler Hobson. At the time of the marriage, appellant's wife had one child by her former marriage, Timothy Hobson, born September 19, 1926.

The Hisses' residences in Washington were: 3411 O Street, June 13, 1933, to June 9, 1934; 2831 28th Street (Apt. 42), June 9, 1934, to April 19, 1935; 2905 P Street, April 19, 1935, to June 15, 1936; Hotel Martinique, June 15, 1936, to July 1, 1936; 1245 30th Street, July 1, 1936, to December 29, 1937; 3415 Volta Place, December 29, 1937, to October 1, 1943; 3210 P Street, October 1, 1943, until they moved from Washington to New York in the fall of 1947.

Facts regarding Chambers: * Chambers was born April 1, 1901, at Philadelphia. He attended Columbia College from the fall of 1920 until early in 1923, and again for at least one semester in the college year 1924-1925.

In February, 1925, Chambers joined the Communist Party. With an interval of withdrawal from the Party between 1929 and 1932, he remained a member until (according to his testimony at this trial) the middle of April, 1938. From October, 1937, to January, 1938, he was employed by the Works Progress Administration with the job title "report editor". From April, 1939, to December, 1948, he was employed by Time Magazine, having been a Senior Editor for a considerable period before his resignation.

Chambers was married on April 15, 1931, to Esther Shemitz. They have two children, a daughter Ellen, born October 17, 1933, and a son John, born August 18, 1936.

Some time in 1934 the Chamberses moved from New York or New Jersey to an apartment at 903 St. Paul Street, Baltimore. How long they stayed there is uncertain.

It is undisputed that late in April or early in May, 1935, the Chamberses occupied Apartment 42 at 2831 28th Street,

* The background facts and dates with respect to Chambers and his wife are based largely on their testimony. In some respects this testimony is uncertain, but the dates given appear to represent the final conclusion of these witnesses.

Washington, which was still under lease to the Hisses and had been vacated by them when they moved to 2905 P Street on April 19, 1935. At the present trial Chambers testified that they moved directly from 903 St. Paul Street to 2831 28th Street (R. 242); Mrs. Chambers was uncertain whether this was correct, or whether, as she had testified before, they had moved from St. Paul Street first to Lynbrook and thence to Washington (R. 987-8, 1003-6).

The Chamberses' testimony as to the length of their stay at 2831 28th Street is also uncertain. It is undisputed that appellant's lease continued to July 1, 1935. Some of the Chamberses' testimony, at this trial and earlier, would indicate that they stayed during practically the full remaining term of the lease (R. 243, 991). But Mrs. Chambers at this trial put the end of the occupancy before the middle of June, 1935 (R. 991-2). At the expiration of their occupancy of the 28th Street apartment they moved to Professor Meyer Schapiro's house on West 4th Street, New York, and thence to a cottage owned by Mr. Boucot at Smithtown, Pennsylvania, which they rented with their friend Maxim Lieber, and at which they stayed until after Labor Day, 1935 (R. 248, 997).

After Smithtown, the Chamberses resided at Eutaw Place, Baltimore, until some time in 1936 (R. 480, 997); went from there to a farm of Maxim Lieber's near Ferndale, Pennsylvania (R. 998), and thence, still in 1936, to the vicinity of New Hope, Pennsylvania (R. 250-1, 998). They stayed at New Hope until the early spring of 1937 (R. 483, 1019-20). Thence they moved to Auchentoroly Terrace, Baltimore, where they resided until some time between October 4 and November 23, 1937, when they moved to Mount Royal Terrace, Baltimore (R. 1052).

The Chamberses stayed at Mount Royal Terrace until in April, 1938, Chambers, according to his testimony in this trial, broke with the Communist Party (R. 264). Thence they moved to a house on Old Court Road, Baltimore, to Daytona Beach, Florida, back to Old Court Road, and then, in July, 1938, to a house they purchased on St. Paul Street, Baltimore (R. 264-5, 970-2).

Other background facts: It is undisputed that appellant and Chambers met in Washington. The time, circumstances and nature of the meeting are sharply disputed. Appellant testified that Chambers came to see him at the end of December, 1934, or early in January, 1935, at appellant's office with the Nye Committee, introduced himself as George Crosley, a free-lance writer doing a series of articles on the munitions investigation, and talked to appellant about phases of the investigation (R. 1841). Appellant fixed the date by reference to the date of completion of certain hearings, which were the subject of the conversation (R. 1843-4). Chambers testified that he was introduced to appellant probably in June or July, 1934, at an unidentified restaurant in downtown Washington by Harold Ware, "the organizer of a large Communist organization in Washington", and J. Peters, "the head of the whole underground of the American Communist Party" (R. 233); that the substance of the conversation was that appellant "was to be disconnected from the apparatus which Ware was then organizer of; that he was to become a member of a parallel organization . . . which [Chambers] was then organizing" (R. 235).

It is undisputed that the Chamberses occupied the apartment at 2831 28th Street for a short period commencing in late April or early May, 1935 (pp. 6-7, *supra*). The circumstances and nature of the occupancy are sharply disputed. Appellant testified that, the remaining period of the 28th Street lease being so short, he had not thought a sub-lease possible (R. 1848-9, 1992); that in one of his meetings with Chambers (as Crosley) relating to the munitions investigation, Chambers told appellant that he was planning to come to Washington for several months to complete his articles on the munitions investigation, that he planned to bring his wife and child with him, and that he was looking for a place to live; that appellant told Chambers that he would be glad to sublet the 28th Street apartment to Chambers at his cost, $60 a month, leaving most of the furniture but not the china, silver or kitchenware (R. 1848-9, 1851-2, 2019); that this conversation resulted in an oral sub-lease,

though Chambers never paid anything except for the gift of a rug in 1936 which appellant considered as part payment in kind (R. 1872, 2010-4). Chambers' version was: "Mr. Hiss suggested that since he had leased a furnished house on P Street, that I might move into his 28th Street apartment which had furniture left in it, and stay there for the balance of the lease . . .", ". . . There was to be no rent" (R. 242); though in answer to a question on the same page, "Was any question discussed about rent?", Chambers also testified "I would be unable to say that I recollect exactly." A further statement by Chambers at R. 242, "This was a friendly gesture between Communists", was stricken on appellant's objection; but substantially the same testimony was brought into the record later (R. 282, 2001). Mrs. Chambers' version is uncertain. In the Maryland action she testified (R. 1006): ". . . We were just there for a short sub-lease . . . I said 'sub-lease', but actually we did not sub-lease the place at all."

It is undisputed that the Chamberses spent a few days at appellant's 2905 P Street house some time in 1935. Appellant and his wife testified that this occurred before the Chamberses moved into the 28th Street apartment, and because Chambers told them that he and his wife and child had arrived but that the van bringing their effects had been delayed (R. 1852-3, 2294). The Chamberses testified that the visit was in the fall of 1935, after they had left Smithtown (R. 248-9, 961, 997).

It is, as has appeared, undisputed that the Hisses and Chamberses knew each other. The nature and degree of their acquaintance are sharply disputed, as will appear sufficiently later in this brief. We mention here only its end. Appellant placed his last meeting with Chambers * in the spring of 1936, while he was still living on P Street (R. 1869). The occasion, he testified, was a request by Chambers, who had borrowed a few dollars at a time on four or five occasions, for another small loan (R. 1870):

* Appellant testified that the conversation summarized in the text might have been by telephone; if so, it followed the last actual meeting (R. 1871).

> ". . . I told him then that I did not think he was ever going to repay the money he owed me; I thought we had better forget about the money he owed me and . . . discontinue seeing each other any further."

Chambers placed his last meeting with appellant just before Christmas, 1938 (R. 268-9). The occasion, Chambers testified, was an unsuccessful attempt to persuade appellant to break with the Communist Party (R. 268). On cross-examination, his testimony was developed in detail (R. 569-73). His story was that he approached appellant's Volta Place house fearing an ambush by the Communists, but that he stayed for supper with the Hisses (R. 571-2). Though Chambers by his own testimony had not seen the Hisses since his break with the Communist Party in April, he explained his initial fear on the ground "that the Party might possibly be watching the houses of my former contacts, thinking that I might return and that they would trap me" (R. 571). In fact, Chambers had been living openly since July in a house he had bought on St. Paul Street, Baltimore, under the name "Chambers" by which he had always been known to the Communists (R. 553).

The General Fact Theory of the Government's Case

As further background, we state briefly the Government's general theory of the facts:

Chambers, an underground Communist, was assigned by the Party in 1934 to set up in Washington an underground organization ("apparatus") of Government employees who, under Chambers' leadership, would furnish confidential Government documents and information for transmittal by Chambers to the Russians. Chambers, finding appellant already a member of another underground organization headed by Harold Ware, brought appellant over into his own apparatus, pursuant to the instructions of J. Peters, head of the American Communist underground. In the early stages of appellant's service in Chambers' apparatus, appellant, then on the staff of the Nye Committee, turned over to Chambers confidential State Department documents

which he had obtained in his official capacity. The culmination came with appellant's dictated acceptance of employment by the State Department in September, 1936. A few months thereafter, early in 1937, Chambers arranged an elaborate clandestine meeting in New York City between appellant and a Russian, Col. Bykov, Chambers' own superior in the Communist underground. At that meeting Col. Bykov instructed appellant to obtain confidential State Department documents, and turn them over to Chambers for the Russians. Following the meeting early in 1937, appellant (then assistant to Assistant Secretary of State Sayre) carried out these instructions, bringing home State Department documents every week or ten days, turning them over to Chambers who called for them there in the late afternoon or early evening, receiving them back from Chambers late at night, again at appellant's house, after they had been micro-photographed, and returning them to the State Department the next morning. Later, when Col. Bykov wanted a more constant supply of documents, Chambers arranged to have appellant bring home State Department documents nightly, and to have copies, extracts or summaries typed by appellant's wife. At each subsequent visit of Chambers, appellant turned over to him for microfilming the accumulation of typewritten papers since his last visit, the particular day's haul of original documents, and occasional handwritten memoranda concerning documents which appellant had been able to see only briefly. Chambers decided to break with the Communist Party late in 1937. He continued the microfilming procedure until his actual break with the Party in the middle of April, 1938. Government's Baltimore Exhibits 1-47 and Government's Exhibits 11 and 12 were samples retained by Chambers for some reason which he has not made explicit.

The Government introduced also testimony calculated to prove close association between appellant and Chambers, and their families. The theory was made explicit in the summation.: ". . . I think you will agree that if there was a close association certain things probably followed. . . . It

meant not only that they were friends but they were in agreement on their basic philosophy, and if they were in agreement on their basic philosophy they were all Communists. . . . . Now if there was a close association and if they were in agreement on their philosophy, then it is probable that each Communist helped the other. And how did Mr. Hiss help? He gave the documents. . . ." (R. 3220).

The evidence presented by the Government was controverted by the evidence for the defense, as will appear illustratively in the following discussion. It should be added here that the second aspect of the Government's factual case, even if believed, would fail in logic to support the conclusion which the Government draws from it.

POINT I

There was insufficient evidence to support a conviction, under the law applicable in perjury cases, and appellant's motion for judgment of acquittal should have been granted.

The falsity of a statement alleged to be perjured must be established by the testimony of two independent witnesses or the testimony of one witness and corroborating circumstantial evidence; where there is only one witness, the corroborating circumstantial evidence must (1) substantiate that witness's testimony and (2) be deemed by the jury to be trustworthy (*Weiler* v. *United States,* 323 U. S. 606 [1945]).

This Court has held the general rule to be that the corroborating evidence must be "independent evidence inconsistent with the innocence of the defendant" (*United States* v. *Isaacson,* 59 F. (2d) 966, C. A. 2 [1932]; see also *United States* v. *Buckner,* 118 F. (2d) 468, 469, C. A. 2 [1941]).

The rule so stated is confirmed by the Supreme Court's use of the verb "substantiate" in the *Weiler* case (323 U. S. at 610). The applicable dictionary definition of that verb is: "To establish the existence or truth of by proof or competent evidence; to verify; as, to *substantiate* a charge" (Webster's New International Dictionary, 2d Ed., 2514).

If there is ever a question as to the strict application of this general rule in a particular case, there should be none in the case at bar, where proof of the alleged perjury depends on proof of appellant's guilt of a crime barred by the Statute of Limitations. [The indictment in this case necessarily stated the alleged facts of espionage in 1938, and the prosecutor in his summation repeatedly emphasized the issue of alleged espionage in 1938 and earlier (R. 3216, 3220, 3237, 3257, 3259, 3261-2).*] The considerations supporting the policy of the Statute of Limitations, particularly the difficulty of disproving allegations regarding the distant past, call for the application here of the strictest standard for corroborating evidence.

A. The Evidence on the First Count Was Insufficient

Only one witness, Chambers, testified directly on the issue under the first count. The question is thus whether the circumstantial evidence offered in corroboration was sufficient. We submit that it was insufficient,—that a jury could not properly find the evidence inconsistent with appellant's innocence, and that therefore appellant's motion for judgment of acquittal should have been granted as to the first count (see motion, R. 3089; see also R. 1309-20).

1. Chambers' testimony cannot supply any essential link in the chain of alleged circumstantial proof.

Before discussing the documentary evidence offered in corroboration on the first count, we point out that no essential link in the chain of circumstantial proof can be supplied by testimony of Chambers himself. Otherwise the circumstantial evidence cannot be "independent" of the witness, and must thus be insufficient under the rule of the *Isaacson* and *Buckner* cases, *supra.*

The central documents in the structure of alleged corroboration, Government's Baltimore Exhibits 1-47 and Government's Exhibits 11 and 12, were produced by Chambers from his possession, and his possession is explained only by his testimony. As will appear from the following

*At R. 3259 and 3262, the prosecutor used the words "traitor" and "treason".

discussion, the structure of alleged corroboration rests, in other essentials also, wholly on Chambers' testimony.

2. The documents themselves do not substantiate, but rather controvert, Chambers' testimony.

The documents which Chambers produced are in three categories: two rolls of developed microfilm (Gov. Exs. 11 and 12), 43 typewritten documents (Balt. Exs. 5-47)*, and four pencil memoranda in appellant's handwriting (Balt. Exs. 1-4). We shall discuss them by categories.

As we understand the cases, we have no obligation to show how Chambers obtained the documents, but at most to show reasonable hypotheses consistent with appellant's innocence as to how Chambers may have obtained them. A showing of such reasonable hypotheses destroys any basis for finding the "corroborating" evidence consistent only with the appellant's guilt. We shall show with respect to all the documents in all three categories reasonable hypotheses as to Chambers' having obtained them from other sources.

Further, as will appear, because of the particular nature of Chambers' story with respect to each of the categories, and because of the particular relation of the documents in each category to each other, a showing that one document in each category did not come from appellant will destroy Chambers' story. Going beyond what is required, we shall show by convincing evidence that one or more documents in each category did not come from appellant.

a. MICROFILM.

As we have explained (p. 3), enlargements of the 58 frames of microfilm (Gov. Exs. 11, 12), with pages grouped to make up whole documents, have been marked Baltimore Exhibits 48 and 50-55.

Five of these, Baltimore 48 and 50-53, comprise a group of related papers dealing with trade agreement negotiations with Germany. Apart from Chambers' testimony that all

* Government's Baltimore Exhibits will be referred to hereafter as "Baltimore Exhibits" and Government's State Exhibits as "State Exhibits", or simply as "Baltimore ....." and "State .....".

the microfilm documents (Balt. 48, 50-55) were photographed in one operation (R. 299-301) and that all these documents were turned over to him by one person at one time (R. 586, 678), it is apparent on the face of the five German trade agreement documents (Balt. 48, 50-53) that these papers were given to Chambers as a group. The internal evidence is convincing that they were given to Chambers not by appellant but by someone who took them from the working files of the Division of Trade Agreements (hereinafter referred to as "TA", its State Department office symbol).

Originals of the State Department documents underlying Baltimore 48 and 50-52 were in Assistant Secretary of State Sayre's office, and thus available to appellant as Sayre's assistant. There is no evidence that State 53 (underlying Balt. 53) was ever in Sayre's office (R. 830-2).

State 48 is an original two-page memorandum on a TA letterhead, dated January 8, 1938, addressed to Sayre and signed by Harry C. Hawkins (Chief of TA). In the fourth line of the last paragraph of this memorandum, the letter "s" has been added in ink. On the face of the memorandum there appears the official receiving stamp of Sayre's office.

Baltimore 48 is a photograph of a carbon copy of State 48 (R. 1087). Hawkins testified: "It was not the practice to send along duplicates with action documents of this kind" (R. 1336). From this testimony, and a strong probability that the ordinary practice was followed, it would follow that no carbon copy accompanied State 48 to Sayre's office. Beyond this, it may be assumed that any carbon copy which might have accompanied such an original would have been conformed to the original. The ink correction in the last paragraph of State 48 does not appear on Baltimore 48. The reasonable conclusion is that the document photographed in Baltimore 48 was a carbon copy retained in the TA working file (see R. 1337).

State 50 is an original sixteen-page memorandum on a TA letterhead, dated December 31, 1937, addressed to Hawkins by C. F. Darlington, an Assistant Chief of TA.

It is one of the papers referred to in State 48, and transmitted therewith by Hawkins to Sayre.

Baltimore 50 is a photograph of a copy of the text of State 50. The last fifteen pages are carbon copies of the last fifteen pages of State 50. But the first page of Baltimore 50 is a carbon copy not of the first page of State 50 as originally typed but of another typing of that page. Ramos C. Feehan, the Government's expert on questioned documents, so testified (R. 1087-90). Even if it be assumed that a carbon copy of State 50 might have accompanied the original from Darlington to Hawkins to Sayre's office, the accompanying carbon could not on any reasonable hypothesis have been the copy photographed in Baltimore 50. The only legitimate inference is that the copy photographed in Baltimore 50 was, again, a copy retained in the TA working file.

State 51 is an official file carbon copy on blue paper of a four-page proposed memorandum to be addressed by the United States Government to the German Government, prepared by Darlington under date of December 31, 1937, and initialled by him and Hawkins. This proposed official memorandum is referred to in the last paragraph of State 50, Darlington's memorandum to Hawkins, as being attached thereto; it unquestionably accompanied State 50 to Hawkins, and with State 48 from Hawkins to Sayre's office. State 51 being a document prepared to be sent out of the Department, the practice would have been to send to Sayre's office (his approval being necessary) the original and a number of exact carbon copies typed with the original (R. 1425, 1968-71). When it was decided not to send the memorandum, the original would have been destroyed, and the exact carbon copy on blue paper sent to the files as the permanent record copy, which State 51 is (R. 825-6).

Baltimore 51 is a photograph of a copy of the text of State 51; but all four pages are carbon copies of a typing run different from that which produced State 51 (R. 1092-3). Since the document (if approved) was destined for delivery to the German Ambassador, since the original so delivered would have been accompanied by an exact carbon

copy, and since other exact carbon copies would have been authenticated for the Department's files, it is inconceivable that the carbon copies accompanying the original to Sayre's office would have been other than carbon copies made in the same typing run as the original (R. 1425, 1968-71). The only possible conclusion is that the copy photographed in Baltimore 51 did not go to Sayre's office, and the only reasonable inference is that this was a copy retained in the TA working file.

The conclusions thus reached with respect to each of the documents photographed in Baltimore 48, 50 and 51 are inescapable when the three documents are considered together. It is, we submit, literally impossible that the three originals transmitted by Hawkins to Sayre's office should all have been accompanied by such makeshift copies.

Having shown that the first three of the five documents in the group of German trade agreement papers were given to Chambers not by appellant but by someone else, we turn to independent supporting arguments as to the remaining two, those photographed in Baltimore 52 and 53.

State 52 is the original of an aide-memoire, in German, handed by the German Ambassador to the Under Secretary of State about October 22, 1937. It bears no evidence on its face where it was distributed within the State Department, the only notation being the Department file number typed down the right-hand margin. Baltimore 52 is, according to Feehan (R. 1093), either a photograph of State 52 before the file number was typed thereon, or a photograph of a true carbon copy of State 52.

On other evidence it is clear that Baltimore 52 is a photograph of a carbon copy. The practice was for an embassy to accompany such a communication to the State Department with at least one exact carbon (R. 1413). According to Department practice, any such communication would be sent promptly, for recording, to the Division of Communications and Records (hereinafter referred to as "DCR", its office symbol); DCR would send the original to the translating office of the Department and, upon receipt back of the foreign-language document and the translation,

would type the file number on the originals of both, but not on copies (R. 1395-6, 1400-1, 1412).

By reference to this practice, it can be demonstrated that the Department file number had been typed on State 52 by November 23, 1937, and therefore that the document photographed in Baltimore 52, which bore no file number when it was photographed, and which (since all the documents were concededly photographed together) must have been photographed after January 8, 1938 (the date of Baltimore 48), must have been a carbon copy of State 52.

The demonstration that the file number was typed on State 52 before November 23 is as follows: The original English translation of State 52 has been marked State 52-A. The practice referred to above shows that the translation would have been made by the translating office of the Department on referral by DCR, and that the file number would have been typed on the originals of both in connection with the translating process. The same file number appears on State 52 and State 52-A. Once the translation was completed, the original translation would accompany the original German-language text (R. 1397-8). State 52-A shows on its face that it was received initially by Sayre's office on November 23, 1937. Thus by that date at the latest the file number must have appeared on the originals of both State 52 and State 52-A (R. 1424-5).

We have thus shown that the document photographed in Baltimore 52 was a carbon copy of State 52, not State 52 itself. The final conclusion is that State 52 itself, with State 52-A, accompanied State 48, 50 and 51 to Sayre's office, and that the carbon copy of State 52, photographed in Baltimore 52, remained in the TA working file. The first part of this conclusion is clear from the text of State 48, Hawkins writing to Sayre on January 8, 1938: "I am returning the German aide-memoire which you sent me on November 23 . . ." The second part of the conclusion, that the carbon copy of State 52 remained in the TA working file, is supported by the natural inference that, having sent on to Sayre's office the original of State 52, TA would retain the carbon copy for its own working file.

As to Baltimore 53: We have noted (p. 15) that there is no evidence that State 53 was ever in Sayre's office. Baltimore 53 is a photograph of State 53. [This is demonstrated by the exact likeness of the corrections by hand on pages 7, 9 and 10.*] That this document (a United States aide-memoire to the German Ambassador, dated July 21, 1937) was in TA at the time Darlington wrote his memorandum of December 31, 1937 (State 50) is shown by the reference to it at the top of page 2 of that memorandum. The reasonable inference on this record is that it remained in the TA working file at least until the time in mid-January when the microfilm was made.

The microfilm, Government's Exhibits 11 and 12, contains, in addition to photographs of the German trade agreement papers, photographs of stencilled information copies (see p. 21, *infra*) of three incoming cables (St. 54, 55). Each of the three copies bears on its face the official receiving stamp of Sayre's office, with the date January 14, 1938; and in each instance appellant's initials are signed in pencil within the stamp. The evidence is that appellant initialled documents in this way after he had examined them (R. 1972-3).

The Government argues that this showing that appellant once had in his possession the documents photographed in Baltimore 54 and 55 is evidence that it was he who had delivered them to Chambers. We submit that the proper inference is directly to the contrary. There is no reason to believe that one engaged in an espionage conspiracy, as Chambers alleges appellant was, would have initialled such documents before turning them over to be photographed, and thus have indelibly identified them with himself, when he could as easily have turned them over first and initialled them later.

A more reasonable inference is that these documents, with appellant's initials, were stolen from Sayre's office after appellant had completed his examination and

*The fact that the file numbers in the margins of the two exhibits are different is explained by testimony that the file number on State 53 was changed (R. 914), obviously after Baltimore 53 was photographed.

Even the most confidential cables had wide distribution in the Department. For example, State 28-A, the distribution copy of a cable to the Secretary of State from Ambassador Bullitt at Paris, which was in the D code (the most confidential), and which began "Strictly Confidential for the Secretary," bears check marks showing regular distribution of information copies to the offices of the Secretary ("S"), the Under Secretary ("U"), the Counsellor ("C"), Assistant Secretary Messersmith ("A-M") and Assistant Secretary Sayre ("A-S"), and "x" marks to the left showing distribution addressed to the chiefs of the offices of Political Adviser Hornbeck ("PA/H"), Political Adviser Dunn ("PA/D"), European Affairs ("EU"), Far Eastern Affairs ("FE"), American Republics ("RA") and Near Eastern Affairs ("NE").

The practice with respect to outgoing cables was similar. The original was first typed on green paper, initialled by those whose authority was required, and sent to DCR for coding and dispatch. This green copy was the official file copy.* Information copies were made by the stencil multigraph process on pink paper. The distribution of such information copies was made and recorded in the same way as with incoming cables; and distribution copies of outgoing cables have similarly been marked in evidence.

The distribution copies of all except two of the cables in evidence show distribution of information copies to Sayre's office, among others, and thus show that a copy of each was available to appellant, among many others (see R. 890-3). The distribution copies of two cables, one dated January 22, 1938, to the Secretary of State from Ambassador Johnson at Hankow (part of St. 11-A), the second dated March 28, 1938, to the Navy Department from the Marine Detachment ("Mardet") at Tientsin (part of St. 42-A), show no distribution to Sayre's office. While there is thus no direct evidence that appellant had access to either of these two cables, we do not, on the point presently being argued, urge that there is a conclusive showing that he did not have access. [That there is a *possibility* of copies of these cables

* These green copies of outgoing cables are marked as State Exhibits.

having reached Sayre's office follows from the fact that the distribution copy of one of the cables photographed in Baltimore 55 (p. 19, *supra*), admittedly received by Sayre's office, shows no check mark against his office symbol (St. 55-A); but the fact that the distribution record was erroneous with respect to that one cable is not *proof* that it was erroneous also with respect to these two others.]

Some of the State Department documents included in State 5-47 are neither incoming nor outgoing cables. Except for State 10 (the typed excerpt from which [Balt. 10] was not typed on the Woodstock typewriter, and which will be separately discussed in another context), they are either despatches received by diplomatic pouch or memoranda prepared and circulated within the Department. No information copies of such documents were prepared by DCR, and the distribution of such documents within the Department is evidenced not by distribution copies but by receiving stamps or other notations on the face of the documents (see, *e. g.*, R. 765, 795-7, 800, 802). The practice was for every office to which such a document was circulated to stamp the document, or some other document part of a single circulating file, to evidence receipt. Mr. Sayre's secretary, Miss Lincoln, testified that this was always done with respect to documents routed to his office (R. 928-9).

The evidence is conclusive that one of these documents, State 13 (copied in full in Baltimore 13), was never in Sayre's office. There is therefore no basis for inferring that State 13 could have been copied by appellant or his wife on their typewriter and the copy given by appellant to Chambers. The only reasonable conclusion is that State 13 was given to Chambers by someone else, presumably someone in FE, the Division of Far Eastern Affairs of the State Department, and copied (with the other typewritten Baltimore Exhibits) as we shall hereafter suggest.

State 13 is a brief memorandum, referred to in the State Department as a "chit" (R. 797), dated February 9, 1938, by J. M. Jones of FE. It is a practically verbatim summary of the essential content of a short despatch from Richard

F. Boyce, Consul at Yokohama, dated January 18, 1938 (part of Def. Ex. VV),* which, as appears from stamps on its face, was received in the Department on February 7, 1938, and in FE on February 9. The content of State 13 shows that it was intended to, and did, circulate with the Boyce despatch of January 18 as a quick summary introduction. The Government does not dispute this (as will appear from the later discussion of State 13-A).

State 13 bears no receiving stamps. The routing of the Boyce despatch of January 18, which circulated with State 13, is shown by pencil notation in the upper right-hand corner; that routing was to FE, A-M/C (Commercial Office of Assistant Secretary Messersmith) and EA (Office of the Adviser on International Economic Affairs). Receiving stamps on the face of the despatch show receipt by FE on February 9, receipt by A-M/C on February 12, receipt by EA on March 16, and filing in DCR on March 21. No stamp of Sayre's office appears on the despatch, and it is thus demonstrated that the despatch, and State 13 which circulated with it, were never in Sayre's office unless they can be shown to have accompanied some other paper which does bear his receiving stamp. There is no credible evidence that the Boyce despatch of January 18 and State 13 were circulated with any other document in the State Department. The conclusion is that neither the Boyce despatch of January 18 nor State 13 was ever in Sayre's office.

The Government sought to remedy this state of the record by advancing the hypothesis (disproved as we shall show) that State 13 and the Boyce despatch of January 18 circulated in the Department with State 15, a memorandum ("chit" or "tag") of Stanley K. Hornbeck (then Adviser on Political Relations), dated February 11, 1938, addressed to Sayre among others. It attempted to support this hypothesis by introducing State 13-A, made up of State 15, State 13 and the Boyce despatch of January 18, stapled together in that order. It elicited testimony from Walter H. Anderson, an employee of the Department, who pro-

* Copies of State 13 and the Boyce despatch of January 18, 1938, stapled together, were marked Defendant's Exhibit VV.

duced the original State Department documents at the trial, that he had produced State 13-A from the State Department file, so stapled together (R. 915). On cross-examination, Anderson admitted that he had no real knowledge what papers were circulated together (*e.g.*, R. 852, 919), that the stapling together of papers in the files did not necessarily mean that the stapled papers had actually circulated together in the Department (R. 844), and in effect that he did not even know whether the papers presently stapled together as State 13-A had been so stapled together when the documents in this case were delivered by the State Department to the FBI on April 7, 1949 * (R. 919-20; see also R. 853-4, 885).

The Government's hypothesis just discussed is refuted by the internal evidence of the documents. State 15, Hornbeck's memorandum of February 11, addressed to the Secretary of State, the Under Secretary, Mr. Sayre, Mr. Feis of EA, and Mr. Murphy of A-M/C, reads:

> "I feel that you will wish to have knowledge of the facts and appraisals given in Mr. Jones' very informative memorandum hereunder (based on Consul Boyce's report)."

It is obvious on the face of State 15 that it cannot refer to the Jones chit of February 9, State 13, since that is neither a "very informative memorandum", nor is it based on a "report" of Consul Boyce (but only on the brief Boyce despatch of January 18). Clearly it refers to what was in fact a very informative memorandum by the same Jones, an eight-page memorandum dated February 7, 1938, State 12, which is in turn explicitly based on a long report of Consul Boyce, State 6-8,** enclosed with a despatch from Consul Boyce dated January 6, 1938, State 5. Hornbeck himself so testified, and testified that it was these documents, and not State 13, that circulated with his memorandum, State 15 (R. 1354-5).***

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* The documents were returned by the FBI on May 10, 1949 (R. 885).

** State 6 is the title page of the report, State 7 the table of contents, and State 8 the 22-page body of the report.

*** In reading this testimony, it is necessary to know that copies of State 15 and State 12, stapled together, were marked Defendant's Exhibit WW.

What is clear on the face of the documents and on Hornbeck's testimony is finally confirmed by other intrinsic evidence in the documents. The receiving stamps on State 12 and State 5 (enclosing State 6-8) show that these documents reached Hornbeck's office on February 9, and had thus been available to him for several days before he wrote his memorandum of February 11 (St. 15). The receiving stamps on the Boyce despatch of January 18 (part of Def. Ex. VV) show that it and State 13, which concededly circulated with it, never went to Hornbeck's office.

The only hypothesis by which the Government sought to show that State 13 was in Sayre's office comes to nothing. The evidence is conclusive that it was never there.

We could stop with this demonstration that one of the State exhibits copied on the Woodstock typewriter was never in Sayre's office, that there is therefore no basis for finding that it was taken from the State Department by appellant and copied by him or his wife, and that the only reasonable conclusion is that it was given to Chambers by someone else (presumably someone in FE). For if any one of the State Department documents copied, extracted or paraphrased in the Baltimore exhibits typed on the Woodstock typewriter was taken from the State Department not by appellant but by someone else, Chambers' whole story regarding the typed documents is demolished.

We go further, however, and point out other aspects of Baltimore 5-47 that undermine Chambers' story that these papers were typed for espionage purposes. Comparison of these Baltimore exhibits with the underlying State exhibits will show that the Baltimore exhibits are a congeries of full copies, excerpts and summaries, with no possible explanation, from the viewpoint of the Russian interest, why some documents should have been copied in full while there are only partial summaries or brief excerpts of others of obviously greater importance. Most illuminating is the omission from particular Baltimore exhibits of matter in the underlying State exhibits clearly of greater interest to the Russians. To illustrate:

The first item in Baltimore 9 is a free paraphrase of part of a cable dated January 5, 1938, to the Secretary of State ("Strictly Confidential for the Secretary") from Ambassador Bullitt at Paris. Reference to the original cable (in State 9) will show that, immediately following the paragraph on the second page from which the author of Baltimore 9 took the material paraphrased in his second sentence, is another paragraph giving Leger's "latest information from Russia" regarding the Russian Government's attitude toward Chiang Kai Shek and the Sino-Japanese war. Obviously the Russians would want to know what information the French had of their attitude; but none of this appears in Baltimore 9. Nor does Baltimore 9 refer to other material in later pages of this cable of obvious interest to the Russians, including an account of Leger's views regarding Chiang Kai Shek, his views regarding the accession of Goga as Prime Minister of Rumania, his report regarding the French attitude towards Rumania (including the statement of an apparently secret French policy that "the military supplies which France had promised to Rumania . . . would be delivered with an eye-dropper . . .") and his statement of the perfect accord between France and England vis-a-vis Germany and Italy (including their policy, while rearming as fast as possible, to "speak softly and amiably to Germany and ignore Italy").

c. Pencil memoranda

As we have explained (p. 3), four pencil memoranda in appellant's handwriting have been marked Baltimore Exhibits 1-4. Each relates to an incoming cable in the files of the State Department, the earliest dated January 28 and the latest March 11, 1938 (St. 1-4).

Chambers' testimony was that Baltimore 1-4 were examples of memoranda made for espionage purposes by appellant "about documents which had passed under his eyes quickly and which . . . he was unable to bring out . . .", and that Chambers would either turn over these memoranda directly to Bykov or have them microfilmed and turn over the microfilm (R. 259). Appellant's testimony

was that these were memoranda made for his own use in pursuance of his duty to examine and sift all cables coming to Sayre's office and report to Sayre on those which he thought should be brought to Sayre's notice (R. 1820), that memoranda of this particular kind were used by appellant in reporting orally to Sayre in his office or at lunch (R. 1821-2, 1917, 1920, 1939-41, 1954, 1957, 2151-5, 2188-9),* and that after they were so used they were either thrown away or left attached to the copy of the cable, to be disposed of with that copy (R. 1963-4, 2184-8).

Sayre's testimony confirms appellant's with regard to the nature of appellant's duties, the frequency of their contacts, and the practice of making oral reports (R. 1478-9, 1480-1, 1489, 1492). His testimony establishes also that each of the memoranda concerned a subject in which he was interested (R. 1489-92, 1494-6, 1497-8, 1504, 1510-1), and on which appellant would thus naturally have reported to him. Sayre did not, of course, remember the particular memoranda which appellant says he had used in making oral reports (R. 1493, 1504, 1507); nor did he remember handwritten memoranda of another kind, which indisputably he had once seen (R. 1486-7, 1507). Nor, as seems natural, did he remember clearly whether appellant used written memoranda in making his oral reports; though he added, "I suppose that there were memoranda" (R. 1493). That it was natural for appellant to write such memoranda by hand rather than dictate them is supported by Miss Lincoln's testimony that the one stenographer in the office served both Sayre and appellant (R. 933).

Here again, as with Baltimore 54 and 55 (p. 19, *supra*), there is no reason to believe that one engaged in an espionage conspiracy, as Chambers alleges, would turn over papers written in his own hand and thus indelibly identify himself as their source.

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*For appellant's testimony as to these particular memoranda, see R. 1917-20, 1961-2, 2082-5, 2090-1, 2156-63, 2188, 2249-50 as to Baltimore 1; R. 1937-41, 1948, 1953-4, 1963, 2179-84, 2247-8 as to Baltimore 2; R. 1954-7, 1962-3, 2191-6, 2248 as to Baltimore 3; and R. 1953-4, 1963, 2189-91, 2247-8 as to Baltimore 4.

There is, moreover, as with both other types of Baltimore documents, internal evidence in these documents which, far from substantiating, controverts Chambers' testimony that they were prepared by appellant and given by him to Chambers for espionage purposes. To illustrate:

Baltimore 1, which can be read and interpreted easily enough by reference to State 1, would without that aid be difficult to read if not illegible (see, *e.g.*, the word "strict" in the handwritten text). Apart from illegibility, it would be impossible to decipher without, for example, appellant's explanation that "M 28" meant to him in his personal shorthand that this was a cable from Moscow dated the 28th of the current month; and without that explanation there would be no way of knowing that this was a cable from Henderson, United States Chargé at Moscow, repeating a telegram sent to him from Washington by Mary Martin. Nor could there have been any reason for the other abbreviations if Baltimore 1 had in fact been written for the use of anyone but its author.

It is evident, further, that the Russians already had the text of Mary Martin's telegram. Obviously Henderson would not have repeated to the State Department the text of her message if she had sent the message to him through Department channels. It follows that she had sent it by commercial cable; and it must be assumed that the Russians would have had the text of any commercial cable sent to our Embassy. These inferences are confirmed by the fact that the text of Mary Martin's telegram is quoted in Henderson's cable (St. 1) in the non-confidential Gray code used for matter otherwise known (pp. 20-1, *supra*).

Baltimore 2 is on its face what appellant says it is, not a memorandum written for espionage purposes. The cryptic references at the top are obviously, as appellant explained, initial notes on a slip of paper to call appellant's own attention to the relevant portion of a particular cable in a file of cables; the initial notes being expanded by appellant when he finally determined that the particular cable should be called to Sayre's attention (R. 1939-40).

Apart from this, there is conclusive internal evidence that Baltimore 2 could not have been prepared for espionage purposes. As with the first cable in Baltimore 9 (p. 27, *supra*), the evidence is found in a comparison of Baltimore 2 with State 2, and in the clear fact that the portions of State 2 not referred to in Baltimore 2 would have been of greater interest to the Russians than the one subject there referred to. Immediately after the portion of State 2 quoted in Baltimore 2, there follows a paragraph dealing with comment by the Chief of the Far Eastern Division of the French Foreign Office on Russian shipments of war material to China. On the following pages State 2 reports French diplomatic and military opinion of the likelihood of an attack by Japan on Russia.

There is, further, a vital contradiction between Chambers' story of the handwritten papers (that they were given to Chambers by appellant in that form because they related to documents "which had passed under [appellant's] eyes quickly and which he was unable to bring out") and the Government's attempt at the trial to show that the subjects to which they related would have been of no interest to Sayre (R. 1497, 1498, 1508, 1510-1, 1516) and thus that appellant's account of reporting on them to Sayre should be rejected (R. 3260-1). We have shown that in fact each of the memoranda related to a subject in which Sayre was interested. But there is no basis, either in the content of the documents themselves or in the testimony, for the further conclusion on which Chambers' story must rest, that the particular documents to which the memoranda related were of *special* importance to Sayre, and Sayre's information copies thus in urgent demand in his office (a conclusion, it will be noted, in direct conflict with the Government's argument that they were of *no* interest to Sayre). If Chambers' story were true, that appellant was able to (and did) "bring out" many other State Department documents, there would be no slightest reason for concluding that he could not have brought out these.

Baltimore 1-4 could not have been prepared by appellant, and given by him to Chambers, for espionage purposes.

The only reasonable conclusion is that they were procured by Chambers from one or more of his sources of material in the State Department (see below), and preserved by him, for purposes of his own. In this context Chambers' characterization of Baltimore 1-4 as "some handwritten specimens from Mr. Hiss" (R. 291) is suggestive.

d. Summary

In the foregoing discussion we have, beyond what is necessary, and despite the difficulty of proving a negative at so late a date, shown by the convincing evidence of the documents themselves that they were not given by appellant to Chambers. We have made such proof with respect to each of the three categories of documents, though in logic it may be argued that disproof as to any one of the categories destroys the whole fabric of Chambers' testimony.

3. The evidence supports reasonable hypotheses as to Chambers' procurement of the documents from other sources.

Appellant is under no burden of showing how Chambers in fact procured the State Department documents photographed in Government's Exhibits 11 and 12 or the typewritten documents or handwritten memoranda making up Baltimore Exhibits 1-47. Persuasive hypotheses clearly consistent with the evidence of the documents just discussed and with appellant's innocence may, however, be easily spelled out from the evidence.

a. Chambers' sources in the State Department

There is uncontradicted testimony of Henry Julian Wadleigh, who concededly for a period of two years from March, 1936, to February, 1938, turned over State Department documents to Chambers, that Chambers, "without mentioning names" (R. 1241-2), "made it abundantly clear" to Wadleigh that "he had other sources inside of the State Department" (R. 1254).

No one of these other sources has been publicly identified by Chambers or by the Government* (except for the

*Pigman, Reno and Harry White, referred to at R. 1255, were not in the State Department.

alleged identification of appellant as one of them), though Chambers was examined about the documents by the House Committee on December 6, 1948,* and though he spent at least two or three months (from some time in December, 1948, or January, 1949, to some time in March, 1949) in daily all-day conferences with the FBI (R. 434-5, 657).

Any attempt on this record to identify Chambers' other sources in the State Department must, therefore, be less than complete. But despite this handicap a persuasive showing can be made.

Wadleigh himself was employed in TA. The Government has made much of the fact that Wadleigh was sent to Turkey on official business early in March, 1938, and could not thereafter have been Chambers' source of State Department documents. But there is evidence from which it may reasonably be concluded that Chambers had another source in TA. Wadleigh testified (R. 1255) about a conversation with Chambers concerning Darlington, Assistant Chief of TA:

> ". . . he started telling me a lot of details about Charles Darlington, his background and career and all the rest, and I said 'How come you know so much about Charlie Darlington?' And he said, 'Well, we naturally like to know about a person who is your roommate so we have made inquiries from our friends in the State Department and that is how I got the information'."

The natural inference that one of the "friends" Chambers referred to was another official of TA is strengthened by the fact that, in his 1939 conversation with Assistant Secretary of State Berle, Chambers mentioned together two officials of TA, Wadleigh and another (see Berle's notes of this conversation, Gov. Ex. 18, p. 2).**

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*As has been noted, only one extract of this testimony, read into the Committee's later public examination of Wadleigh, has ever been published. This extract, in which Chambers, after examining the microfilmed documents, identified Wadleigh as a possible source of some of them, is set forth several times in the present record (*e.g.*, R. 588).

**In arguing that the inference should be drawn that there were two sources in TA, we do not suggest that Chambers' identification of the second person should be accepted as true.

It is demonstrable, from Baltimore 10 and State 10, that Chambers also had a source in FE. Baltimore 10, a typewritten excerpt from State 10, was produced by Chambers with the other typewritten documents (Balt. 5-9, 11-47) which he asserted he had obtained from appellant. It is undisputed that Baltimore 10 was not typed on the Woodstock typewriter (R. 1075). At this trial for the first time Chambers suggested on cross-examination that he might have received Baltimore 10 from Harry Dexter White (R. 582), though after redirect and recross-examination he reasserted "I believe Alger Hiss gave me that paper" (R. 655; see also R. 595-7, 654-6, 660). There is in the record and in the documents themselves no basis (apart from Chambers' assertions) for finding that he received Baltimore 10 either from appellant or from White, an official of the Treasury Department. There is no evidence that any copy of State 10 went to the Treasury or anywhere else where it would have been available to White. There *is* internal evidence in State 10 that it went in the State Department only to FE (and to DCR for filing). State 10 is a counterpart, from the State Department files, of a periodic report, dated January 7, 1938, prepared by the Military Intelligence Division of the War Department, to which is attached a War Department routing slip dated January 13, 1937, marked "For Mr. Hamilton." Hamilton was the then Chief of FE (R. 869). State 10 bears only two receiving stamps, that of FE dated January 18, 1938 (see R. 1398), and that of DCR dated February 8, the date of filing. This being the type of document of which no information copies were made in the State Department, the receiving stamps show the only offices in the State Department to which the document went (R. 871, 1391, 1393-4; see also p. 23, *supra*). The only reasonable conclusion * is that Chambers had a source in FE who, between January 18 and February 8, made the excerpts from State 10 of which Baltimore 10 consists.

* The other theoretically possible source would be DCR; but, as will be suggested below, that is a likely source of documents only where there are copies of documents (other than the filed original) in the State Department, and there is no evidence that there were any such copies of State 10.

The conclusions that Chambers had a source besides Wadleigh in TA and another source in FE do not exhaust the possibilities. It is matter of common knowledge that the Communists have frequently used as their sources inconspicuous employees in important organizations. Thus it is by no means impossible that Chambers had sources among the many employees (including clerks and messengers) of DCR for copies of incoming and outgoing cables, or extra copies of other documents, or stolen documents like the pencil memoranda.

b. Possible sources of particular documents

Baltimore 1-4 (the pencil memoranda in appellant's hand) and the documents photographed in Baltimore 54 and 55 (information copies of cables bearing Sayre's office stamp and appellant's initials) were taken by some one or more of Chambers' contacts from appellant's office or after they had left his office.

Identification by appellant of the persons who took them is, of course, impossible. But it can be shown that, as the State Department was then run, the taking would not have been difficult. The time was before the war, and before security measures had been tightened (R. 758, 1325-6). Appellant's door was always open (R. 934, 1340, 1444). State Department officers waiting to see Sayre were free to use appellant's office while waiting (R. 1340, 1444, 1965-6); and a lawyer friend of appellant's who visited the State Department in 1937 or 1938 on business for a client (not involving appellant) testified (R. 2123):

> "After I had finished my business I went down and saw Alger Hiss . . . I went into his office and he was not there and I waited. While I waited no secretary was there, no messenger, no one except myself. He came there after I waited for, I would say, 15 minutes."

Within offices, papers were left on desks during working hours (R. 950, 1443-4). Stealing the papers from appellant's office would have been simple for anyone in Chambers' apparatus.

It would also have been simple for a DCR clerk or messenger to steal information copies of cables already dis-

posed of by Sayre's office (like Baltimore 54 and 55) and the pencil memoranda if those were left clipped to the information copies of the cables to which they related (as appellant testified was one of the possibilities). Such information copies were periodically collected by DCR messengers, returned to the "telegraph branch" of DCR, and, when "enough to take to the basement and burn" had been accumulated, taken there by messengers in "little pushcarts they had with wire baskets . . . they just filled them up and took them down there" (R. 1388-9). In this process, abstraction of information copies, or pencil memoranda clipped to them, would have been easy.

Nor would there have been any real risk of later discovery, whether the papers were taken from appellant's office by a DCR employee or any other employee of the State Department, or taken later by a DCR messenger or clerk from the accumulation of used papers. Disappearance of informal pencil memoranda would not have been noticed. Nor would there have been the slightest likelihood of discovery that information copies of cables, already disposed of by stamping and initialing, had been abstracted. So far as Sayre's office itself was concerned, an accumulation of like papers in large volume (R. 951, 1479) would be held for periodic collection and disposal (R. 930). Nor was there in DCR any system of accounting for information copies of cables once distributed (R. 858, 1326-7).

The distribution copies of all incoming and outgoing cables in State 5-47 (underlying the typewritten Baltimore exhibits) show that information copies of each went to one or more of FE, TA and the office of Pasvolsky, Special Assistant to the Secretary (office symbol "SA"). Pasvolsky's office was part of the general TA suite, and his work included trade agreements matters (R. 1334; Def. Ex. 4xW), so that material sent to SA would have been easily available to Chambers' sources in TA. It was not unusual for offices to retain information copies over considerable periods for working use (R. 1389-90). Such copies were readily available to any of Chambers' sources in the offices to which they had been distributed.

Information copies of cables were also readily available to employees of DCR, both through the process of collecting old copies, just referred to, and because extra information copies, prepared originally in DCR, were kept there for three to six months (R. 858, 1388).

The only documents underlying Baltimore 5-47 which are not cables are State 5-8, 10, 12, 13, 15, 36 and a despatch from The Hague included in 47. We have already shown that Baltimore 10 and Baltimore 13 are attributable to Chambers' source in FE. As to the others:

In our discussion of State 13, we have noted (p. 25, *supra*) that State 12 was a long memorandum prepared by Jones of FE, based on a long report of Consul Boyce, State 6-8, enclosed with a despatch from Consul Boyce, State 5. State 5 bears on its face, over the FE receiving stamp, a notation "Copy in FE". Obviously FE retained also a copy of the long Jones memorandum, State 12. As to State 15, Hornbeck's memorandum of February 11, circulated with State 12 and 5-8 (pp. 25-6, *supra*), Hornbeck testified that his office would have sent a copy to FE (R. 1356), as would have been natural since State 15 commented favorably on FE's work. Thus Chambers' contact in FE was the clearly probable source of Baltimore 5-8, 12 and 15.

State 36, copied in full in Baltimore 36, is a memorandum by Sayre, dated February 18, 1938, of a conversation with the Secretary of State and Vladimir Hurban, the Czechoslovak Minister, with the title "German domination of Central Europe and Czechoslovak trade agreement." It bears on its face the TA receiving stamp dated February 19, with a notation indicating that TA retained a copy after returning the original to Sayre's office (R. 880). One of Chambers' sources in TA is thus an obviously possible source of Baltimore 36; and Wadleigh admitted that he might have given State 36 to Chambers (R. 1213, 1218-9).

Included in State 47 is a three-page despatch dated February 26, 1938, to the Secretary of State from the Legation at The Hague, an excerpt from which is included in Baltimore 47. This despatch shows on its face that it was sent in quintuplicate. A possible source would be Cham-

bers' source in TA other than Wadleigh (who had already left for Turkey), since the despatch bears the SA receiving stamp dated March 16, 1938, and any office to which a document of this kind was circulated might detach and retain a copy (R. 879). If all the copies had not been detached when the original was returned to DCR for filing on March 30, a DCR clerk or messenger would be another likely source.

The one source in the State Department identified by Chambers and the Government (apart from their allegations against appellant) is Wadleigh. Appellant has no burden of showing how Chambers procured any of the documents; and we do not put Wadleigh forward as *necessarily* the source of any of them. He appears nevertheless to have been a likely source of some of them.

The general purport of Wadleigh's testimony was that he had an "absence of recollection" of giving to Chambers any of the State Department documents involved in this case (R. 1228-9), but that "anything that I received in connection with my work I may have passed out" (R. 1241). Using this standard, and examining the documents, he testified that he might have given some of the State Department documents underlying Baltimore 5-47 (R. 1228, 1237) and the German trade agreement papers photographed in Baltimore 48, 50-53 (R. 1216-9, 1229). This tentative testimony must be appraised and judged against the background of his other testimony.

Wadleigh estimated that the number of State Department documents he turned over to Chambers and David Carpenter (another Communist associated with Chambers [R. 405-7]) was "somewhere in the neighborhood of 400", figuring that he had made deliveries approximately a hundred times during two years, and that the average number of documents delivered was four or five at a time (R. 1145). Chambers estimated that Wadleigh delivered ten to twenty-five documents at a time (R. 407); on his estimate, Wadleigh's total deliveries would come to somewhere between 1,000 and 2,500 documents. Of all the documents that he

had delivered, Wadleigh could remember the specific content of only one and the general nature of some others, none involved in the present case (R. 1134-5, 1145-6, 1253); he could not remember a single paper delivered in the winter of 1937-1938 (R. 1201). It is against the background of this testimony that one must appraise his "absence of recollection" of documents involved in this case.

Wadleigh's testimony must be judged also against the background of his obvious attempt to minimize his moral guilt, for example by repeatedly objecting to counsel's characterization of his activity as "stealing" (R. 1131-2, 1136-7), and by correcting one of the articles he had written for a newspaper in the summer of 1949 to eliminate a statement that he had "spied against [his] own country" (R. 1138-9). His testimony, noted above, that he gave to Chambers (and Carpenter) only what he received in connection with his work (R. 1241; see also R. 1118, 1123, 1124) is, we suggest, another attempt to minimize his moral guilt. In fact he conceded on cross-examination that he picked up around the State Department, and passed on, any oral information that he thought the Communist Party would like to have (R. 1150-2, 1252), and finally that he took all the papers that he thought would be of interest to Chambers and Carpenter if he could get them out without being caught (R. 1204). There is illuminating testimony by his superior, Darlington:

> "I think there were times Wadleigh had a well developed curiosity, I might say, in a lot of things that were going on. There were occasions when . . . I would come into my room after lunch and Mr. Wadleigh would be there reading a paper . . . he would be at my desk maybe reading one of the papers . . . Official papers" (R. 1443; see also R. 1446-7).

And Wadleigh conceded that he carefully tried to hide his curiosity (R. 1151).

There is another factor supporting the likelihood of Wadleigh's having turned over to Chambers in the early months of 1938 various of the State Department documents involved in this case. Apparently some time late in 1937

(R. 1129, 1167, 1222), Chambers introduced Wadleigh to "a person who used the name of Sasha", and intimated to him that Sasha was Chambers' "boss in the apparatus" (R. 1129; see also 1164-5). On direct examination, Wadleigh testified that Sasha "said that people in Moscow thought a person who . . . received the papers that I turned in must also be receiving other papers which they did not get from me" (R. 1130). On cross-examination more was elicited (R. 1164-73). He testified: "I certainly indicated that I was intending to do my best and that I hoped I would have the opportunity to do better" (R. 1170); "As I remember it, he said that they suspected me of holding back some material" (R. 1171); he assured Sasha that he was not holding anything back, and tried to explain the situation to him (R. 1172). It may be inferred that following this conversation Wadleigh would have made special effort to satisfy the "boss" of the apparatus.

On Wadleigh's entire testimony, he would appear to be a possible source of those documents underlying Baltimore 5-47 copies of which were in TA or SA before he left for Turkey (though the distribution copies show that almost all these documents went to FE also, and Chambers' contact there was an equally likely source of those).

Wadleigh, if not Chambers' other contact in TA, would appear to be Chambers' source of the German trade agreement papers (Balt. 48, 50-53). The primary ground of Wadleigh's "opinion" that he did not give those papers was that he did not recall having worked on the German trade agreement matter or recall having seen the particular documents (R. 1113-5). But doubt is cast on Wadleigh's recollection both by his own testimony as to the nature of his duties in TA (R. 1113, 1238) and by Darlington's testimony that matters within Wadleigh's particular field were involved in the German trade agreement negotiations (R. 1449-50). The evidence is clear, moreover, that the TA working files were readily available to anyone in the Division (R. 1219-20, 1337, 1340). Particularly in the face of Wadleigh's concessions on cross-examination, the grounds on which he put his "opinion" are unconvincing.

Wadleigh denied that he gave to Chambers the documents photographed in Baltimore 54 and 55, information copies of cables bearing Sayre's office stamp and appellant's initials. [In his initial testimony (R. 1116-7) he said merely that he had no recollection of having given them; later in his testimony his denial became more emphatic (*e.g.*, R. 1226, 1229).] His denial was based on the ground that he did not remember the documents, and would have remembered them as a "rich find" if he had seen them (R. 1225-7), and on the further ground that he had never taken anything out of Sayre's office unless authorized to do so (R. 1127). We have already discussed reasons for disbelieving both grounds. It is, moreover, reasonable to believe that, after his conversation with Sasha, Wadleigh would have been on the lookout for "rich finds." And Wadleigh could easily have gone to Sayre's office, and into appellant's room, without arousing suspicion (p. 34, *supra;* R. 1127, 1149). [Wadleigh is a possible source also of three pencil memoranda, Baltimore 1-3, despite his denial (R. 1229). He is not a possible source of Baltimore 4, dated after he left for Turkey.]

It will be remembered that Chambers testified that all the documents photographed on the microfilm (*i.e.*, the German trade agreement papers and Baltimore 54 and 55) were given to him by one person at one time (R. 586), and that that one person was appellant (R. 678). This testimony could be corroborated only by evidence that in fact *all* the microfilmed documents came from appellant. While a common source is thus a necessary part of the Government's case, it is not a hypothesis binding on appellant. In showing, as we have, that the German trade agreement papers did not come from appellant, but probably from a source in TA, and that there is reasonable ground for inferring that the information copies of cables came from a source in TA or elsewhere, we go further than we need go to destroy Chambers' testimony.

c. The typewritten documents

We have shown (pp. 26-7, *supra*) strong ground for concluding that the typewritten documents, Baltimore 5-9

and 11-47, were not typed for espionage purposes. We have shown conclusively (pp. 23-6, *supra*) that one of the underlying State Department documents, State 13, was never in Sayre's office, and thus that there is no basis for finding that that document was taken from the State Department by appellant, copied by him or his wife on their typewriter, and the copy (Balt. 13) given by appellant to Chambers, but that, on the contrary, the only reasonable conclusion is that State 13 was given to Chambers by someone else. We have noted, further, that that conclusion demolishes Chambers' whole story regarding the Baltimore typed documents. We come, therefore, to consider other explanations for the existence of those documents. There is no burden on appellant to show who typed the documents on the Woodstock typewriter, or how the typewriter was obtained by whoever typed them; but we shall discuss reasonable hypotheses.

To clear the ground for this discussion, we point out first that there is no evidence in the record (apart from Chambers' assertion that appellant's wife did the typing) that either appellant or his wife was the typist. Feehan, the Government's expert on questioned documents, whose testimony regarding the typed documents appears at R. 1074-82, 1096-1102 and 1105-6, was not asked his opinion as to the identity of the typist, and gave no opinion. Using four standards concededly typed on the Woodstock typewriter in 1937 and earlier (three by appellant's wife and one by her sister) and comparing these with the Baltimore typewritten documents, Feehan testified to his conclusion "that the same machine was used to type Baltimore Exhibits 5 through 9 and 11 through 47 that was used to type the four known standards" (R. 1074, 1080-1, 1106). He was not cross-examined as to this conclusion.*

The prosecutor in his summation asked the jury to conclude from typing errors common to two of the standards of comparison and the Baltimore typed documents that

*It was, in fact, conceded by appellant for the purposes of this trial that Feehan's opinion was valid, counsel for appellant stating to the jury in his opening (R. 201) and in his summation (R. 3145, 3162) that experts consulted by the defense had held the same opinion.

appellant's wife was the typist (R. 3258). We shall have more to say of this in Point V. In the present context we point out simply that there were also typing errors, and corrections of typing errors, common to the Baltimore documents and various of the letters typed by Chambers in evidence as Defendant's Exhibits W to W-7, and common to the Baltimore documents and the "Memorandum of Conversation, Tuesday, March 20, 1945, Westminster, Md.," included in Government's Exhibit 17. [Government's Exhibit 17 consists of two memoranda from the files of Raymond Murphy, a State Department security officer, of conversations with Chambers at Chambers' farm in Westminster on March 20, 1945, and August 28, 1946 (R. 275-6, 604). The August 28, 1946, memorandum has the appearance of having been typed in Murphy's office on his return to Washington. The appearance of the March 20, 1945, memorandum is in sharp contrast, and justifies an inference that it was typed while Murphy was at Chambers' farm. Whoever typed the memorandum, the existence of typing errors common to it and the Baltimore documents is relevant on the present argument.]

Examples of the errors and corrections common to the Baltimore documents and the others just mentioned are:

(1) Eight instances in the Baltimore documents, comprising 64 pages, where the small or capital letter "r" is typed over the letter "i" (Balt. 5, line 17; Balt. 8, p. 6, line 48, p. 9, line 29; Balt. 12, p. 2, line 52; Balt. 14, line 10; Balt. 22, p. 1, line 21; Balt. 24, p. 1, line 21; Balt. 28, p. 1, line 49); one such instance in all the documents in evidence typed by appellant's wife, comprising ten pages (Gov. Ex. 34, line 13); two in the two-page memorandum of the Chambers-Murphy conversation (Gov. Ex. 17, p. 1, line 9, p. 2, line 31); none in Chambers' letters, comprising eight pages (Def. Ex. W to W-7).

(2) Two instances in the Baltimore documents where the letter "r" is typed over the letter "o" or the letter "o" over the letter "r" (Balt. 11, p. 3, line 11; Balt. 28, p. 1, line 12); no such instances in the documents typed by appellant's wife; three in the memorandum of the Cham-

bers-Murphy conversation (Gov. Ex. 17, p. 1, lines 10, 33, p. 2, line 21); two in Chambers' letters (Def. Ex. W, line 10; Def. Ex. W-5, line 10).

(3) Two instances in the Baltimore documents where the letter "q" was struck instead of the letter "w" (Balt. 12, p. 2, lines 32, 52), and one where the letter "w" was struck instead of the letter "q" (Balt. 22, p. 1, line 11); no such instances in the documents typed by appellant's wife, or in the memorandum of the Chambers-Murphy conversation; one in Chambers' letters (Def. Ex. W-5, line 15).

(4) Nine instances in the Baltimore documents of a proofreader's handwritten transposition mark (Balt. 8, p. 1, line 13, p. 6, line 50, p. 13, line 17; Balt. 12, p. 1, line 39, p. 2, line 15; Balt. 13, line 2; Balt. 16, line 40; Balt. 22, p. 1, line 19; Balt. 28, p. 1, line 10); no such instances in the documents typed by appellant's wife or in the memorandum of the Chambers-Murphy conversation; two in one of Chambers' letters (Def. Ex. W-3, lines 11, 29).

The failure of the Government to elicit an opinion from its witness Feehan as to the identity of the typist is clear ground for concluding that he had no basis for identifying the typist as appellant's wife. The prosecutor's argument from common errors is controverted by our showing that the same argument could identify others.

The Government must therefore argue that the fact that the Baltimore documents were typed on the Woodstock typewriter once owned by appellant establishes that they must have come from appellant. That argument is clearly untenable, not only because it is inconsistent with the reasonable inferences from the documentary evidence, but because there are other reasonable hypotheses as to the typing, consistent with appellant's innocence.

The Woodstock typewriter (in evidence as Def. Ex. UUU) was given to appellant and his wife by her father on his retiring from business in the early '30's (R. 1915, 2345). It was used by appellant's wife for occasional typing, including some of the typing on the manuscript of a book published by her in 1934, and thereafter intermittently until 1937. The latest of the specimens of her

typing on the Woodstock which have been found, as the result both of a search instituted by appellant and his wife soon after Chambers first produced the Baltimore documents (R. 747-9, 2131) and of a countrywide search by the FBI (R. 2999), is dated May 25, 1937 (Gov. Ex. 34). It appears that by the end of 1937 the typewriter was in poor condition, some of the keys sticking and the roll having to be operated by hand (R. 1598-9, 1722-3, 2364). It is not suggested that the typewriter could not be used (R. 1558-9, 1623, 2379, 2634, 2637); but there is no doubt that there was difficulty in using it.

When the Baltimore documents were first produced, both appellant and his wife stated to the FBI that they had had an old typewriter (Gov. Ex. 45; Def. Ex. 6xB). [Though they did not at first remember the make, they did remember and disclose that it came from the office of appellant's wife's father; and they undertook to obtain samples of typing, which they turned over promptly to the FBI (R. 747-9, 2509) and from which the make could be readily ascertained.] Appellant's first recollection, which he also stated to the FBI, was that they had had that typewriter through 1938 (Gov. Ex. 45). Neither appellant nor his wife remembered at first how it had been disposed of (R. 1917, 2088; Gov. Ex. 45; Def. Ex. 6xB).

It is undisputed that appellant and his wife gave the Woodstock typewriter to Perry (Pat) and Raymond (Mike) Catlett, sons of their then maid, Claudie Catlett, at some time between the last days of December, 1937, and the middle of April, 1938. The Catlett boys associated the gift with appellant's move from 1245 30th Street to 3415 Volta Place (R. 1584-6, 1716-7, 1719-22, 1731-2), which concededly took place on December 29, 1937. George Roulhac, a Government witness, testified that he first saw the Woodstock at the house at 2728 P Street, of which he and the Catletts were co-tenants, about three months after they moved there (R. 2967); and he placed the date of their moving there at January 17, 1938 (R. 2965-6).

For the purposes of the present argument, it is unnecessary to fix the date of the gift of the Woodstock to

the Catlett boys within the range of this testimony. Whether the Woodstock left appellant's possession towards the end of December, 1937, or whether it remained in his possession until the middle of April, 1938, there are reasonable hypotheses on which it can be concluded that the Baltimore typed documents were typed by Chambers or some confederate of his. These hypotheses, we recognize, must include an hypothesis as to Chambers' motive (rational or irrational). It is necessary first, assuming a motive arguendo, to discuss the means.

It is reasonable to conclude that Chambers knew of the Woodstock typewriter. Apart from a possibility of its having been left at appellant's 28th Street apartment when that apartment was occupied by the Chamberses (R. 1852, 2348, 2403), he might have seen it during their visit of a few days to the P Street house or during some other visit of his to 28th Street or P Street. Knowing of its existence, Chambers would have had no difficulty in ascertaining its location in 1938, as by a casual inquiry to their maid on the telephone, which she would no longer remember. [The inquirer might, for example, have said he was a friend of the Hisses, or a typewriter dealer, and asked whether their old typewriter was for sale or needed repair.]

While the Woodstock was at the Catletts', there would have been many possible means of access by Chambers, either himself or through an intermediary. The evidence is that the typewriter was left lying about at the Catletts', rarely used, part of the time in a back hall next to an accessible back door, part of the time in a downstairs room with a separate door leading to the street (R. 1586-8, 1621-2, 1713, 2970; see Def. Exs. VVV to VVV-4). The Catletts kept boarders, and their house was the scene of frequent parties (R. 1586-7, 2965, 2970, 3012). It would have been easily possible for Chambers to obtain the hardly-used typewriter for a few days, in circumstances which no one would now remember (see R. 1621).

It would have been possible also for Chambers to obtain access to the typewriter if, during the period he used

it, it was still at appellant's house. Observation would have revealed without difficulty when the house was empty, on the maid's day off. Obtaining access to an empty house would have presented no difficulty to one of Chambers' experience (see in this connection R. 2219-20).

There is no evidence, apart from Chambers' testimony, when the Baltimore documents were typed. Chambers testified that in May or June, 1938, he put the Baltimore typed documents with the microfilm and pencil memoranda, and with other papers from other alleged sources, in an envelope which he gave to his wife's nephew Nathan Levine for safekeeping (R. 291-2) and that he took them out of that envelope in November, 1948, a few days before he produced some of them in the Maryland action (R. 291-3). Levine testified that he received an envelope from Chambers at an unspecified time in 1938 (R. 727) and that he turned the same envelope over to Chambers in November, 1948 (R. 727-8); but Levine did not at any time see the contents of the envelope (R. 728, 729). There is thus no testimony but Chambers' that the Baltimore typed documents were in the envelope. If they were not, the documents could have been typed by Chambers on the Woodstock at any time after the date of the latest State documents to which they relate (April 1, 1938). Even if the documents were in the envelope left with Levine, Chambers could have typed them at any time between early April and (on Chambers' testimony) May or June of that year.

At whatever time Chambers typed the documents, the likelihood is that he copied them from a roll of microfilm. His possession of the microfilm in evidence in this case, Government's Exhibits 11 and 12, shows either that he held that microfilm out from his current deliveries to the Russians, or that he obtained at the time duplicate sets of microfilm and kept one for himself. Either practice would have supplied him with microfilm from which he could at his convenience have typed the Baltimore typed documents; and the typing would have required access to the Woodstock typewriter for only a day or two.

The inference that Chambers himself typed the Baltimore typed documents draws strength from the weaknesses of his own story of the alleged typing for appellant by appellant's wife (as well as from the other weaknesses of his whole story, to be discussed in Point III).

Chambers' testimony is that he picked up documents from appellant's house every week or ten days (R. 257-8); that originally the documents were only "what Mr. Hiss had on his desk that day or a selection therefrom" (R. 258); that some time in mid-1937 he "told Mr. Hiss that we wished to have the papers brought out every night, or approximately every night and some of them typed* as nearly verbatim as possible and some of them paraphrased" (R. 258); and that thereafter he "received not just the documents from a single day, but typed documents which covered the approximate periods I have mentioned—a week or ten days or so, plus the documents for the single day . . ." (R. 258-9). There is evidence in the documents themselves discrediting this story. For example:

Baltimore 36 is a verbatim copy of State 36, a memorandum by Sayre, dated February 18, of a conversation with the Secretary of State and the Czechoslovak Minister. We have already noted (p. 36, *supra*) the obvious possibility that Chambers obtained from one of his sources in TA the carbon copy of the memorandum that TA retained. We note here that, the memorandum having originated in Sayre's office, a carbon copy would have remained there indefinitely. If appellant had in fact abstracted that document, he would certainly have taken it home on the day of one of Chambers' visits and given it to him for microfilming, thus (besides supplying him with a copy authentic on its face) avoiding a wholly unnecessary typing job.

The same demonstration can be made with respect to Baltimore 5-8. The receiving stamps on State 5, the despatch enclosing State 6-8, show that those documents were in Sayre's office from February 16 (the date of his receiving stamp) until March 11 (the date of the next receiving stamp, that of A-M/C). If appellant had in fact

*"Mrs. Hiss was to type them" (R. 259).

abstracted these documents (contrary to the evidence that the FE copy was abstracted by Chambers' FE source [p. 36, *supra*]), appellant would again have given the documents to Chambers on one of the microfilming nights. Here he would thus have avoided a particularly onerous typing job. Baltimore 5-8 make up 16 pages of the 64 pages typed in Baltimore 5-47 (excluding Baltimore 10).

Chambers' whole story of the typing of the Baltimore typed documents assumes, moreover, that appellant, engaged in espionage activity, would have identified himself with the documents by having them typed by his wife on an old typewriter, easily identified, when he could easily have used a new typewriter, probably unidentifiable (see R. 1099-1101), or a typewriter which, if identifiable, could not be traced to him.

These factors, logically inconsistent with Chambers' story, are not only consistent with but indeed fortify an hypothesis that Chambers himself typed the Baltimore typed exhibits, probably from microfilm, and typed them on a typewriter identifiable as once having been owned by appellant, for use against appellant.

There are still other weaknesses in Chambers' story that appellant is responsible for the typing of the typed Baltimore documents on the Woodstock. The Government's theory is that, as soon as appellant learned in the middle of April, 1938, that Chambers had (as he alleges) left the Communist Party, appellant realized that the typewriter was incriminating, and sought to dispose of it by giving it to the Catlett boys, in whose hands "it would be put to abuse and gradually disintegrate, gradually" (R. 3252-3). But if there had in fact been in appellant's mind, as the Government asserts, any guilty association with the typewriter and fear of disclosure by Chambers, giving it to the Catlett boys would have appeared a futile means of disposal. At the time Claudie Catlett was still appellant's maid, and the typewriter could have been found in the possession of her sons with utmost ease. The undisputed fact that appellant did give the typewriter to the Catlett boys

by the middle of April, 1938, at the latest, is, contrary to the Government's argument, clear evidence against its theory.

When the subject first came up in 1948, appellant stated frankly to the FBI his then recollection that he had had the Woodstock typewriter through 1938, the year in which all the Baltimore documents were dated (Gov. Ex. 45). His first recollection turns out to have been mistaken, but it was the mistake of a consciously innocent man.

4. Motive

Two experts, Carl A. L. Binger, M. D., a psychiatrist, and Henry A. Murray, M. D., a psychologist with psychiatric experience, each having particular qualifications and experience in the field in which he testified (R. 2519-24, 2585-90, 2599, 2604, 2770-7, 2787-9, 2790-1, 2792-8, 2800-3, 2806-11, 2813, 2816-7, 2850, 2860, 2882-3), testified for the defense. We shall refer again to their testimony under Point III. It is relevant also in the present context. Both experts testified that Chambers suffered from a mental ailment known as psychopathic personality* (R. 2550, 2812, 2882); both testified that psychopaths are of various types, and that the conduct of such persons may include stealing, pathological lying, other types of deception, and pathological false accusation (*e.g.*, R. 2551, 2815, 2824); and Dr. Binger defined pathological lying as "a kind of living out of a part, playing a part as if it were true, assuming a role" (R. 2567)—"These unfortunate people have a conviction of the truth and validity of their own imaginations, of their own fantasies without respect to outer reality; so that they play a part in life, play a role . . . and on the basis of such imaginations . . . they will make accusations which have no basis in fact . . ." (R. 2552-3, 2674). Both testified also that a psychopath has a defect of conscience, which renders him insensible to the feelings and sufferings of others, and leaves him without restraint against attacking and destroying them (R. 2558, 2559, 2823, 2824,

*The experts testified that psychopathic personality is not insanity, that the psychopath is not subject to commitment, that he is usually unaware of the nature of his illness, and that he may occupy responsible positions and live a life apparently normal on the surface (R. 2552, 2558-9, 2590, 2815, 2816, 2826-7, 2861).

2846). They adhered to their opinions after extended cross-examination (R. 2769, 2787, 2949). No expert testimony was offered by the Government in contradiction.

We concede that a jury would not be bound to accept Dr. Binger's and Dr. Murray's diagnosis of Chambers as a psychopath. We submit, however, that on the issue of corroboration the uncontradicted expert testimony that there is such a mental ailment as psychopathic personality (with the characteristics which Dr. Binger and Dr. Murray described) and the documentary evidence that "psychopathic personality" is recognized by the New York State Department of Mental Hygiene as a mental disease (Def. Ex. 6xH; see R. 2550, 2782-4) cannot properly be disregarded. In considering reasonable hypotheses as to motive, therefore, the hypothesis that Chambers *may* have suffered from this mental ailment cannot be excluded.

If we are right in this argument, there is no need to go further on the question of motive; rational motive is unnecessary for a psychopath.

If, however, the foregoing argument is not accepted, there are other reasonable hypotheses which cannot properly be disregarded on the issue of corroboration.

The common law doctrine which requires the careful scrutiny of the testimony of alleged accomplices supports one hypothesis. That doctrine is based on general experience that a guilty person is likely for his own ends to make false accusations against another, alleged by him to be a participant in his crime but in fact innocent. It would accord with the general experience that gave rise to the accomplice rule for Chambers to have built up against the day of discovery a false framework of "circumstantial evidence" to support false accusation against appellant for his own ends. For that purpose, no one would be more appropriate than the most prominent (and promising) of the non-Communists whom he knew. And the reasonableness of this hypothesis is borne out by what has in fact occurred, with Chambers himself, a confessed spy and perjurer, escaping all punishment (R. 77).

If rational motive is to be sought, there is still another reasonable hypothesis. A spy would have had a natural motive to cover his actual espionage sources, and to manufacture evidence to support the cover.

Finally, we point out that the reasonableness of hypotheses as to motive cannot be viewed in isolation and without regard to the great strength of the factual hypotheses. To give one example: We have shown that the omission from Baltimore 2, one of the pencil memoranda, of matter in State 2 obviously of greater interest to the Russians demonstrates that Baltimore 2 could not have been given by appellant to Chambers for espionage purposes. There is thus a compelling inference that Chambers had some other motive for obtaining Baltimore 2 and preserving it, whether that motive be rational or irrational.

5. Pseudo-corroboration

As we have shown, the evidence relating to the documents themselves does not substantiate, but rather controverts, Chambers' testimony. The Government offered through two witnesses, Felix Inslerman and Frederick E. Webb, additional evidence regarding the microfilm.

Chambers testified that he turned over to Inslerman, to be photographed on microfilm with his Leica camera, the documents which Chambers said appellant had given him (R. 259, 500-1, 615, 665); and he identified Government's Exhibits 11 and 12 as microfilm so produced (R. 300, 615).

Inslerman identified a Leica camera that he had owned at the time. The camera was marked in evidence, over appellant's objection (R. 1260-1; Gov. Ex. 51).*

Webb, an FBI expert, testified over appellant's objection that Government's Exhibits 11 and 12, the Baltimore microfilm, had been photographed on Inslerman's camera (R. 1303), and supported his conclusion by comparative photomicrographs (R. 1304-8; Gov. Exs. 52, 53).

This evidence, offered (in the prosecutor's words) "to corroborate . . . to the nth degree" the "detail" in Cham-

*It was admitted subject to a motion to strike out if not connected with the defendant; but the Court's later ruling, overruling an objection to Webb's testimony (R. 1303), made such a motion pointless.

bers' story "that the documents he received from Hiss were only photographed by Inslerman" (R. 1303), was wholly unconnected with appellant except by Chambers' testimony, and has no tendency to corroborate Chambers' story that the documents came from appellant (*cf. Sykes* v. *United States,* 204 Fed. 909, 912, C. A. 8 [1913]).

B. The Evidence on the Second Count Was Insufficient

We shall argue in Point II that the Court erred in construing the second count of the indictment to permit the jury to convict on finding that there were meetings between appellant and Chambers after January 1, 1937, but at times other than "in or about the months of February and March, 1938," or meetings in that 1938 period other than on the occasions of the alleged deliveries of documents by appellant to Chambers.

If we are right in that contention, the only witness and the only alleged corroboration are the same on the second count as on the first. But we do not rest on that contention alone. We proceed here to show that, even if the second count is construed to permit conviction on proof of *any* meetings after January 1, 1937, the evidence was insufficient to justify submission of the case to the jury under the law applicable in perjury cases, and appellant's motion for judgment of acquittal (R. 3089; see also R. 1309-20) should have been granted as to the second count.

1. There was no more than one witness to any of the alleged meetings after January 1, 1937.

No witness but Chambers and his wife testified to any alleged meeting of Chambers and appellant after January 1, 1937. There is indeed only one other witness, Edith Murray, a former maid of the Chamberses, who testified to any disputed meeting at any time between either of the Chamberses and either of the Hisses; and Mrs. Murray's testimony related to the period when the Chamberses were living at Eutaw Place, Baltimore, which ended in 1936.

Chambers and Mrs. Chambers did not, in any instance of alleged meetings after January 1, 1937, testify to the

same meeting. Only one part of the testimony as to alleged meetings calls for more from us than that flat statement—testimony by Chambers about one alleged meeting in December, 1937, and testimony by Mrs. Chambers about another alleged meeting in the same month.

Chambers testified to seeing the Hisses at the Chamberses' house on Mount Royal Terrace, Baltimore, "around Christmas of 1937 . . . it was a Christmas—loosely a Christmas occasion" (R. 262). On cross-examination, he admitted that in the Maryland action he had testified that it was a New Year's Eve party, but repeated that his present recollection was that it was around Christmas (R. 564-6); and on redirect he adhered to the Christmas date: "My recollection is that it was Christmas. I do not say that it could not have been New Year's; I do not recall the exact occasion . . ." (R. 629). Mrs. Chambers testified to a visit of the Hisses to the Chamberses at Mount Royal Terrace when ". . . we celebrated, just the four of us, their wedding anniversary, which was some time in the middle of December . . . 1937" (R. 968). [The Hisses' wedding date is December 11.] On cross-examination, given every opportunity by appellant's counsel to place the meeting at "around Christmas time", Mrs. Chambers answered: "No, I have placed it last, I believe, at somewhere in the middle of December" (R. 1009), and adhered to her testimony that it was a wedding anniversary party (R. 1006-7, 1009, 1013, 1017-9). She admitted on cross-examination (R. 1009, 1018) that in the Maryland action she had testified that she did not "remember any time this minute that I did see [the Hisses] at Mount Royal . . . I don't visualize it. It may come to me later on", and had there testified also that the alleged wedding anniversary party had been at the Hisses' house on Volta Place (which would place it in December, 1938, eight months after, according to both the Chamberses, he had broken with the Communist Party and gone into hiding). At this trial she added: ". . . I had that sort of mixed up. That was a mistake of having the wedding anniversary at the other house. It was at our house" (R. 1018).

The evidence would not, we submit, support a finding by a jury that Chambers and Mrs. Chambers were testifying to the same alleged meeting. . . . .

If the rationale of the two-witness rule of proof in perjury cases is to be satisfied, we submit that each of the two witnesses must testify to the same event. The Court so charged in this case (R. 3273), and we know of no decisions except in the Third Circuit reaching a different result.

In *United States* v. *Palese,* 133 F. (2d) 600, C. A. 3 (1943), the Third Circuit upheld a conviction for perjury in denying the purchase of votes, where there was testimony by two witnesses as to the separate purchase of their respective votes. This decision has been followed by the same Circuit in two others, *United States* v. *Margolis,* 138 F. (2d) 1002, C. A. 3 (1943), and *United States* v. *Seavey,* 180 F. (2d) 837, C. A. 3 (1950), cert. den. 339 U. S. 979. We respectfully suggest that the Third Circuit doctrine is unsound, and that this Court should not adopt it. But even if this Court should be inclined to apply the doctrine in some circumstances, we urge that it should not do so in a case where, as here, the two witnesses are closely related, and by hypothesis both have participated in the alleged events. Since the question is whether appellant met Chambers, Mrs. Chambers can by hypothesis testify relevantly only to alleged meetings at which both Chambers and she were present. Since both must have knowledge if those events were true, we submit that both should be subjected to the test of cross-examination to determine the truth.

2. There was no circumstantial evidence corroborating the testimony of any witness as to any of the alleged meetings after January 1, 1937.

Chambers testified to three alleged meetings with appellant after January 1, 1937, as to which the Government offered what it contended was corroborating circumstantial evidence. There was no such corroboration.

There was no alleged meeting after January 1, 1937, testified to by *Mrs.* Chambers as to which there was even an

attempt to corroborate by circumstantial evidence. The Government did introduce in evidence (as a standard of comparison used by Feehan [R. 1074]) a letter of May 25, 1937, from appellant's wife to the University of Maryland (Gov. Ex. 34), in which appellant's wife said that she was "extremely anxious to take [a course in inorganic chemistry] and obtain the necessary credit for Mercy Hospital's training course in medical technology". The prosecutor in his summation (R. 3233), referring to the letter by date, argued that it supported Mrs. Chambers' testimony that the interest of appellant's wife in a course at Mercy Hospital was the subject of constant conversation. But here there is no *testimony,* relevant under the indictment, to be corroborated; for Mrs. Chambers' account placed these conversations at the time when the Chamberses were living at Eutaw Place, that is, at the latest in 1936 (R. 964, 1028). [On cross-examination of Mrs. Chambers, it was brought out that in the Maryland action she had testified: "I believe it was at that time that Mrs. Hiss was enrolled at Mercy Hospital to learn nursing. She did not stay there very long . . ." (R. 1029). The evidence is that appellant's wife took the proposed course at the University of Maryland in the summer of 1937 (*e.g.,* Def. Ex. PP) but that she never took any course at Mercy Hospital (R. 1981, 2315). She had discussed the possibility many times, over a number of years (R. 1980), and it was doubtless mentioned during the time when the Hisses and the Chamberses concededly knew each other.]

a. CHAMBERS' STORY ABOUT A RUG

The fact that at some time Chambers gave appellant a rug was first mentioned in appellant's House Committee testimony on August 16, 1948. His account was that Chambers had given him a rug, which Chambers said had been given to him by some patron of his, and which appellant told the Committee was a payment on account of Chambers' indebtedness on the sub-lease of the 28th Street apartment (R. 1868, 1872; House Committee Hearings, p. 964). Appellant repeated that account before the Committee in Chambers' presence (R. 1986, 1997); he repeated it at this

trial, fixing the time of the gift in the winter or spring of 1936 (R. 1868, 1872, 1986, 2013-4, 2041-2). [Appellant's wife also testified that she had been present at the time of the gift (R. 2303-4, 2398-9).]

Chambers' story of a rug (first advanced months after these House Committee hearings) is that at some unspecified time before the alleged clandestine meeting of Chambers and appellant with Col. Bykov (which Chambers placed "I believe . . . in January, 1937" [R. 254]), Chambers pursuant to Bykov's order gave appellant one of four oriental rugs which he had purchased on Bykov's order with money given him by Bykov (R. 254-5); and that he had, before the gift, told appellant that he would receive "a gift from the Soviet people in recognition of the work of the American Communists" (R. 255). Chambers further testified that he arranged the purchase of the four rugs through Professor Meyer Schapiro, whom he instructed to send them to George Silverman in Washington (R. 254-5), and that subsequently he, Chambers, behind a restaurant on the Washington-Baltimore road, carried one of the rugs from George Silverman's car to appellant's car and gave it to appellant (R. 255).

Chambers' testimony does not fix a date after January 1, 1937, for this occasion, and therefore, standing alone, is irrelevant under the second count. The Government sought to supply a date after January 1, 1937, and to corroborate Chambers' testimony, by circumstantial evidence. It offered, first, testimony by Professor Schapiro (R. 724-6) and of Edward H. Touloukian (R. 718-20) that in December, 1936, Schapiro, with money furnished by Chambers, purchased from Touloukian's company four oriental rugs; that these rugs were delivered to Schapiro on December 29, 1936; and that a short time thereafter Schapiro shipped them to Silverman at an address in Washington which Chambers had given him. It also introduced documentary evidence of the transaction between Schapiro and Touloukian's company (Gov. Exs. 41, 42, 42A, 44).

Concededly this evidence justifies the inference that these four rugs reached Washington after January 1, 1937. It

also substantiates Chambers' testimony that he ordered the four rugs through Schapiro, and that these rugs were delivered to him through George Silverman. But it leaves wholly uncorroborated the only part of Chambers' testimony that touches appellant, namely, that he delivered one of these four rugs to appellant.

b. Chambers' story of a trip to Peterboro

Having testified before the House Committee that he had never stayed overnight on any automobile trip with the Hisses (R. 455), Chambers testified here: "In 1937 Mr. and Mrs. Hiss and I took a trip beyond Peterboro, New Hampshire" (R. 278); that he met appellant and his wife in Washington on the morning of August 9, 1937 (R. 430-2), drove with them in their automobile the first day to Thomaston, Connecticut, where they stayed at a tourist home which he has not since been able to identify (R. 432-5), drove with them the next day beyond Peterboro to the entrance of Harry Dexter White's property, leaving appellant and his wife by the car while he went to the house to see White (R. 278, 436-7), drove back with them to Peterboro, staying overnight "in a house which is called Bleak House, I believe" (R. 278, 437, 443, 445-6), and going that evening to a performance of "She Stoops to Conquer" at a summer theatre near Peterboro (R. 279, 429), and drove back on the third day to New York (R. 279).

Appellant and his wife denied the story (R. 1853, 2296).

There is a complete absence of evidence other than Chambers' testimony connecting appellant in any way with the alleged events. Thus, the guest book of Bleak House, the only place identified in Chambers' story as a place where he and the Hisses stayed overnight, contains no supporting entry (R. 1673-4, 1678-9; Def. Ex. V). Since, however, the Government offered several items of pseudo-corroboration, we should discuss those items here.

By testimony of Edith Bond Stearns, manager of the Peterboro Players, and by introduction of copies of the Peterboro Transcript for August 5 and 12, 1937, the Government proved that "She Stoops to Conquer" was pre-

sented by the Peterboro Players from August 10 to August 15, 1937 (R. 720-1, 723; Gov. Ex. 43). But proof that "She Stoops to Conquer" was presented in Peterboro on August 10, 1937, has no tendency to substantiate Chambers' testimony that the Hisses were there with him.

In support of Chambers' testimony that he had driven beyond Peterboro to see Harry Dexter White, the Government introduced through Chambers photographs of White's house, taken at an unspecified date (R. 632-3; Gov. Exs. 25, 26). In his summation, the prosecutor said (R. 3232):

> "In connection with that he said he went up to Harry Dexter White and he parked at a fork in the road just enough down so the Hisses could not see. He showed you the picture. No contradiction about that. Ladies and gentlemen, that is corroboration."

But photographs of White's property can have no tendency to substantiate Chambers' testimony that the Hisses ever drove him there.

c. Chambers' story of a $400 loan

The final alleged instance of meetings between appellant and Chambers after January 1, 1937, as to which the Government offered what it contended was corroborating circumstantial evidence was first testified to by Chambers at the first trial (R. 547).

Chambers testified that in November, 1937, appellant lent him $400, part of the purchase price of a Ford sedan purchased at that time by Chambers' wife (R. 263-4), and that in connection with this loan Chambers talked with both appellant and his wife (R. 264):

> "I said that I wished to buy a car; that Colonel Bykov was opposed to my using a car, but that a car was very necessary in the work I was doing; and either Mr. Hiss or Mrs. Hiss then offered me this amount of money, the amount I have named."

He admitted that he had never repaid the loan (R. 548).

Appellant and his wife denied the story (R. 1873, 2325).

The Government offered alleged corroboration.

By testimony of Lloyd Stoker of the Schmidt Motor Car Company, Randallstown, Maryland (R. 714-16), and by

introduction of an extract from the books of that company (Gov. Ex. 40), the Government proved that Mrs. Chambers purchased a Ford sedan on November 23, 1937, at a total price of $811.75, which was paid by an allowance of $325 for a 1934 Ford sedan and $486.75 in cash. This evidence has no tendency to substantiate Chambers' testimony that appellant lent him $400. Indeed, by showing that the Chamberses had a 1934 Ford sedan, it tends strongly to refute Chambers' own testimony, quoted above.

The other evidence offered as corroboration was evidence of a withdrawal in cash by appellant's wife on November 19, 1937, of $400 from a joint savings account with the Riggs National Bank (R. 689-90).

Appellant and his wife testified, in as much detail as the lapse of time permitted, to their actual use of the $400 withdrawn. Since the Government attacked their testimony, and the prosecutor in his summation argued that the explanation offered by appellant and his wife (through its incredibility) corroborated Chambers' version (R. 3241-2, 3247), we discuss this testimony and related evidence.

There was documentary evidence (relating to their Riggs Bank accounts, and appellant's purchase of a new car on the instalment plan two months before) that appellant and his wife had little money available for purposes other than their own (R. 1873-6, 2003-5, 2396-7; Def. Exs. FF, GG, HH, 4xO), and indeed that early in December appellant and his wife borrowed $300 from the Riggs Bank (R. 1875, 2340-1; Def. Exs. FF, GG). They testified that the $400 withdrawal was primarily in anticipation of the purchase of furniture and furnishings for the new house on Volta Place to which they expected to move from their smaller 30th Street house, and that part of the money was probably also used for the purchase of an evening dress (R. 1880, 1983-6, 2044-6, 2326, 2336-40, 2387-96). So far as memory permitted (R. 2340), they specified the purchases.

The Government attacked this testimony in three respects, arguing first that, since appellant and his wife had charge accounts at various department stores, there was no reason for cash purchases; second, that if cash pur-

chases were to be made there was no need of withdrawing the full amount of cash at once; and third, that appellant and his wife could not at the time of the cash withdrawal have counted on occupancy of the Volta Place house.

As to the first and second Government arguments: The testimony, primarily by appellant's wife, as to her reasons for buying in antique shops, specialty shops and elsewhere than in department stores where she had charge accounts, and her reasons for paying in cash out of a separate cash fund, is sensible on its face, and wholly consistent with common knowledge as to how young couples may act in such matters. In any event, a conclusion that some other course of conduct might have been more sensible would not show that this course of conduct was not in fact followed.

To support its third argument, the Government produced as a rebuttal witness Mrs. Gladys F. Tally, daughter of the Mrs. Flannigan from whom appellant rented the Volta Place house. Mrs. Tally (who had not testified at the first trial) testified that she had inserted an advertisement of the Volta Place house in the Washington Post of Sunday, December 5, and that she had shown the house that day to several prospective tenants (R. 3059-63). She testified also that she had talked to Gilliat, the agent with whom the house had been listed, about several persons who had seen it on December 5 (R. 3060-1):

> "... the other couple I had asked Mr. Gilliat to give me a couple of days to see if they could take the house. Well, they couldn't. And in the meantime he had told me that he did have a client for the house. . . . it was just a few days after December 5th I would say."

The "client" turned out to be appellant (R. 3061).

The inference which the Government sought to draw from this evidence, that appellant and his wife could not on November 19, 1937 (the date of the $400 withdrawal) have counted on occupancy of the Volta Place house, is, however, negatived by other evidence.

Appellant and his wife testified that their dealings with regard to the Volta Place house had been with Gilliat (R. 1984, 2513-4). This is consistent with Mrs. Tally's

testimony; indeed her testimony confirms that, except for her showing the house on December 5, she had had little to do with the job of attempting to rent it, and nothing to do with the rental to appellant. When she was shown on direct examination, with the December 5 advertisement in the Post, four advertisements in the Washington Star dated October 17, 26, 27 and 28, 1937, and was asked whether she could remember whether she put in the earlier advertisements, she replied (R. 3060):

> "No; I may have, you see, early in October, but I don't recall that. I only remember the one on that particular Sunday [December 5] because I was responsible for that, and did show the house that day."

Mrs. Tally testified further that she and her husband moved from Washington to Philadelphia on November 1 (R. 3059), and that shortly thereafter her mother, Mrs. Flannigan, who had vacated the Volta Place house when the Tallys moved, and herself moved to an apartment (R. 3067, 3068), had a stroke (R. 3059) and went to a nursing home (R. 3061). Meanwhile, in October, the house had been listed for rental with two brokers, primarily Gilliat, who was given the keys and who "was the only one who really did anything about renting the house" (R. 3066-7).

Mrs. Tally's testimony makes it clear, finally, that she was uninformed as to Gilliat's negotiations with appellant, and as to the actual signing of the lease. Shortly after December 5 she went from Gilliat's office to call on Mrs. Hiss (R. 3061). It is apparent from her testimony that the lease had already been concluded, and that this was a social call to meet the incoming tenant. As to the lease itself, Mrs. Tally had no recollection when it was signed or how,—whether she took it out to the nursing home for Mrs. Flannigan's signature or Gilliat did (R. 3061, 3068-9), or indeed whether she ever saw the lease (R. 3068).

Mrs. Tally testified honestly according to her recollection of events more than twelve years old. It is clear, from what she does remember, that Gilliat had much more than she to do with the whole attempt at rental, and had everything to do with the rental to appellant.

The lease of the Volta Place house from Mrs. Flannigan to appellant, dated December 2, 1937, and signed by Mrs. Flannigan, appellant, and Gilliat for his company as agent, is in evidence (Gov. Ex. 69). A sub-lease of appellant's 30th Street house, bearing the same date and signed by appellant, the lessee, and Gilliat's company as agent, is also in evidence (Def. Ex. 5xC). Each of these leases contains typed matter in addition to printed formal text; and that typed matter confirms a natural inference that negotiations, and reduction to writing of the result of negotiations, must have preceded the execution of the two instruments.

Appellant testified that his negotiations with Gilliat for the Volta Place house began early in November, and that by the time of the $400 withdrawal he had from Gilliat "a commitment . . . that he was confident that the price which we were prepared to pay would be satisfactory to the owner of the Volta Place house" (R. 1984, 1986).* The other evidence supports this testimony. It is entirely clear that Mrs. Tally was not in touch with what Gilliat was doing, and sufficiently clear that Gilliat considered Mrs. Flannigan as the one to whom he was to report. When Gilliat said in the middle of November that he was confident that appellant could have the Volta Place house, he was at a minimum predicting correctly what was formalized by the signature of a lease dated two weeks later. The Government's third ground of attack on the testimony of appellant and his wife is no better than the first and second.

A jury could not permissibly infer from the withdrawal of the $400 from appellant's savings account that appellant loaned the $400 to Chambers. There is, on the contrary, a clearly reasonable inference that Chambers' learning of the $400 withdrawal was the actual source of Chambers' story, first told at the first trial (in June, 1949). The

* Mrs. Tally having testified as a rebuttal witness on the last day of the trial, appellant had no opportunity to call Gilliat to testify in the light of her testimony, the substance of which had never before been intimated. In view of this circumstance, the prosecutor's comment in summation, "Perhaps Mr. Gilliat would have told us about the lease. He was the agent; he had done all of the committing" (R. 3239), was, we submit, unjustified.

Government had subpoenaed the records of appellant's accounts with the Riggs Bank early in February, 1949 (R. 697-8). Chambers was in daily all-day conferences with the FBI from some time in December, 1948, or January, 1949, to some time in March, 1949 (R. 434-5, 657). Especially in view of the fact that the FBI permitted Chambers to question at their offices two of appellant's former maids, Claudie Catlett and Martha Pope, as to the furnishings and arrangement of appellant's various houses (R. 462-4, 465-70, 672-3, 1546-8, 1570-1)—a matter in our view of extreme impropriety in view of the fact that Chambers was later to testify to his own alleged recollection of these very matters—there is strong ground for concluding that Chambers heard of the $400 withdrawal during his all-day FBI conferences. This conclusion is fortified by the carefully limited questions asked on his direct examination. He was not asked whether he had learned in any way of the $400 withdrawal, but was questioned only as follows (R. 626):

"Q. Now, have you ever seen Mr. or Mrs. Hiss's bankbooks or bank accounts or bank statements? A. I never have.

Q. Never have? A. Never.

Q. In no shape or form? A. In no way.

* * * * * *

Q. And you say that you have never seen his bank account, his book, cancelled vouchers or statements, is that correct? A. That is correct."

POINT II

The Court erred in construing the second count of the indictment to permit the jury to convict on finding that there were meetings between appellant and Chambers after January 1, 1937, but at times other than "in or about the months of February and March, 1938", or meetings in that 1938 period other than on the occasions of the alleged deliveries of documents by appellant to Chambers.

The charging paragraph of the first count (R. 3-4) charges that appellant's testimony quoted in that count was

untrue in that he delivered State Department documents to Chambers "in or about the months of February and March". The charging paragraph of the second count (R. 4-5) charges that appellant's testimony therein quoted was untrue in that he saw and conversed with Chambers "in or about the months of February and March, 1938".*

Appellant requested the Court to instruct the jury that they must acquit under the second count unless they found that appellant had seen or conversed with Chambers on the occasions in February and March, 1938, referred to in the first count (Req. Nos. 5 [R. 3181], 18 [R. 3185-6]). The requests were denied, and appellant excepted (R. 3176). The Court (differing from the Court at the first trial)** instructed the jury that they could convict under the second count on the basis of any meeting after January 1, 1937 (R. 3273, 3275), and, specifically, that the jury might acquit on the first count and still convict on the second count (R. 3275). Appellant excepted (R. 3277). The Court's charge summarized fully the first count of the indictment, including its charging paragraph, but the summary of the second count omitted reference to its charging paragraph (R. 3263-4).

This Court has held that an indictment for perjury is sufficient which alleges that the oath of the accused was false, without alleging "what the truth was" (*United States* v. *Otto,* 54 F. (2d) 277, C. A. 2 [1931]; *Sharron* v. *United States,* 11 F. (2d) 689, C. A. 2 [1926]). The rule is based on an assumption that in the particular case "the allegation of falsity is in effect an allegation which shows with certainty what the government claims the truth to have been" (*United States* v. *Otto,* at 278).

We submit that the language of the second count preceding the charging paragraph does not meet this assumption. The testimony of appellant before the Grand Jury which the second count quotes begins with a question and answer regarding Chambers' testimony that he had obtained

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* We concede, as to both counts, that the specification of this period would cover events in January or April, 1938.

** Transcript, first trial, 2915, 2919.

typewritten copies of official State documents from appellant. This beginning colors the rest of the testimony quoted so that, even without the charging paragraph, the most reasonable construction appears to be that the alleged falsity of appellant's testimony lay in his denial of seeing Chambers at the times of the alleged transmittal of documents. This construction is supported by a consideration of the indictment as a whole, with its reference in the charging paragraphs of both counts to the same period.

If that construction be adopted, then the whole text of the second count, not merely the charging paragraph, is consistent with appellant's position, and inconsistent with the Court's. If, on the other hand, it be argued that the language of the second count preceding the charging paragraph should (by emphasis on the last questions and answers quoted) be construed as meaning that the alleged falsity of appellant's testimony lay in his denial of seeing Chambers at *any* time after January 1, 1937, then we submit that the charging paragraph, being in conflict with this hypothetical construction, cannot properly be treated as mere surplusage which may be disregarded (see *Ford* v. *United States,* 273 U. S. 593 [1927]). To do so would be to go contrary to the rationale of *United States* v. *Otto.*

The charging paragraph of the second count discloses what the Grand Jury intended to charge when it found the indictment (*cf. Ex parte Bain,* 121 U. S. 1 [1887]; *United States* v. *Norris,* 281 U. S. 619 [1930]; *Dodge* v. *United States,* 258 Fed. 300, C. A. 2 [1919], cert. den. 250 U. S. 660). Under the construction of the second count adopted by the Court, the jury were permitted (even though they were to disbelieve the testimony, or find no corroboration, under the first count) to convict under the second count on believing (and finding corroboration for) Chambers' story of the alleged $400 loan, which he never mentioned until the first trial, or his story of the alleged Peterboro trip, which he first "recalled" during his "recollections to the FBI some time in the spring of this year [1949]" (R. 618), or his story of the alleged gift of a rug in January, 1937, in

the absence of any showing that he told that story to the Grand Jury or, if he did, placed the date in 1937.

Our argument rests not alone on a construction of the indictment, but also on a bill of particulars (R. 87) furnished pursuant to an order of the District Court (R. 84-5) on appellant's motion (R. 6, 10-1). The motion, relying on the language of the charging paragraph, asked for specification with regard to the occasions on which it was alleged that appellant saw and conversed with Chambers "in or about the months of February and March, 1938". The Government's memorandum in opposition stated (R. 36):

> "The indictment charges that the defendant saw Chambers in February and March, 1938. This is all the particularity necessary. The other information sought would be merely evidentiary details."

On oral argument of the motion (R. 44-79) nothing was said by Government counsel (one of the two who had presented the matter to the Grand Jury) to indicate any idea of going outside the period specified. The bill of particulars (R. 87) limited the occasions within that period to those involved under the first count (see, *e.g.*, item 1(b) of the bill of particulars as to Count I, incorporated by reference in item 3(a) as to Count II). This amounted, we submit, to the binding adoption of that construction of the second count which is in any event, on the face of the indictment, the most reasonable construction.

POINT III

The error hereinafter discussed was not "harmless".

In the following points, we shall discuss error in the trial. We show here that the error was not "harmless" (*Kotteakos* v. *United States,* 328 U. S. 750 [1946]).

A. The Government's Case Was Weak

We supplement here the showing made under Point I.

Chambers' story about appellant is on its face fantastic, and, as it is analyzed, becomes increasingly incredible.

Chambers asks one to believe that appellant, engaged in an espionage conspiracy with him, publicly identified himself with his co-conspirator by lending him the use of the 28th Street apartment, still in appellant's name, where appellant and his family had been living for ten months. He asks one to believe also that for a period of more than a year, at intervals of a week or ten days, he came to appellant's house in the afternoon or early evening to pick up stolen State Department documents, and came back to appellant's house late the same night or in the early hours of the next morning to return the documents.

Chambers and Mrs. Chambers ask one to believe that from 1935 to 1938 there was a close social association,—that the Hisses entertained the Chambers family for several days at P Street after the 28th Street lease had terminated, and planned to put up Mrs. Chambers and her infant daughter indefinitely while Chambers went abroad on a contemplated espionage mission (R. 248-9, 340-1);* that there were frequent social visits by the Chamberses to the Hisses in Washington and by the Hisses to the Chamberses in Baltimore, New York, Smithtown and New Hope (*e.g.*, R. 250-1, 345, 639, 959-60, 963, 967-8, 1010, 1017-8), meals together in public restaurants (*e.g.*, R. 457-8, 957, 964-5, 1065), and long motor trips to Peterboro, Long Eddy, and Erwinna (*e.g.*, R. 245-6, 277).**

In contrast, there is evidence how accomplices in espionage really act. Wadleigh testified that his practice with Chambers and Carpenter was to hand over a brief case, after he left work, at a prearranged meeting place on a street corner, and to get back the brief case at a prearranged place on his way to work the next morning (R. 1111, 1137). Chambers confirmed this (R. 404). Both testified that neither had ever been at the other's house and that Wadleigh had never met Mrs. Chambers; each thought

*The story of this contemplated mission was told for the first time at this trial, after the defense had first discovered Chambers' 1935 passport application in the name of David Breen (Def. Ex. D; see R. 141-61; Def. Ex. 5xX), though the House Committee and the FBI had had copies of the passport application since March, 1949 (see Def. Exs. 5xS, 5xT).

**The alleged Long Eddy and Erwinna trips were first testified to at this trial (R. 545, 991-2).

that Chambers might have met Mrs. Wadleigh once (R. 652, 1113).

The Hisses and the Chamberses agree that the Hisses never knew the Chamberses under the name "Chambers" (R. 673, 999). The Chamberses were living openly in Baltimore as "Chambers" in 1937 and 1938 (R. 483, 487, 998, 1019-20; Gov. Ex. 40; Def. Ex. DDD). The Chamberses' repeated testimony as to visits by the Hisses to them in Baltimore in those years is thus on its face incredible.

Central to Chambers' story of appellant's espionage is the figure of Col. Bykov. It was Bykov, the story goes, who ordered Chambers late in 1936 to give appellant an oriental rug as a gift from the Soviet people (R. 254-5). Shortly thereafter, in January, 1937, the story continues, Chambers, on Bykov's order, arranged a meeting. The way had been paved in the fall of 1936 (R. 253):

> "I told Mr. Hiss that Colonel Bykov, whom I knew under the pseudonym 'Peter', at that time was an underground worker in a Soviet apparatus and that—I don't remember whether I told him originally that Peter wished him to turn over documents to the apparatus or not or whether I introduced the subject more gradually."

Later (R. 254):

> "I told Mr. Hiss that Peter wished to meet him—Peter, Colonel Bykov that is; that the meeting was to take place in New York. . . ."

Accordingly, appellant met Chambers at "a cafeteria on Chambers Street" (R. 254). Thereupon (R. 255-6):

> "I took Mr. Hiss . . . in Brooklyn to the Prospect Theatre, a movie house on Ninth Avenue. We went into that movie house and sat down on a bench on the mezzanine. . . . Colonel Bykov came out of the audience and I introduced him to Alger Hiss."

From the movie house, the story continues, the three walked up Ninth Avenue toward Prospect Park, along Prospect Park to Grand Army Plaza and then, "either by taxi or subway, or both, we came to Manhattan and went to the

Port Arthur Restaurant in Chinatown" (R. 256). Conversation at the restaurant, perhaps started during the walk, was summarized by Chambers (R. 256):

> "The substance of the conversation was that the Soviet Union was acutely endangered by the rise of the Fascist powers; that it needed help, and that Mr. Hiss could greatly help if he would procure documents from the State Department. . . . Mr. Hiss agreed."

During the conversation Bykov spoke only German and Chambers acted as interpreter (R. 257). At one point the conversation turned to appellant's brother Donald (R. 257):

> "Colonel Bykov asked Mr. Hiss if Mr. Hiss's brother, Donald Hiss, could also procure documents,* and Mr. Hiss replied that he did not know whether or not his brother was yet sufficiently developed for such work. Colonel Bykov said perhaps he can persuade him."

Chambers remembers this well (R. 257):

> "Because Colonel Bykov spoke German with a very thick accent and the German word for persuade is 'uberreden', and Colonel Bykov mangled the word so badly that I had difficulty in understanding him and I saw Mr. Hiss look at me curiously wondering why I could not understand the Colonel better."

Finally (R. 257):

> "We all three went down to the street. I don't recall whether I went with Mr. Hiss or I went with Bykov. I am just not sure."

In the Maryland action, Chambers had told the Bykov story with vitally different dates (R. 494):

> "Some time in 1937, I think about the middle of the year, J. Peters introduced me to a Russian who identified himself under the pseudonym Peter, I presume for the purposes of confusion between his name and J. Peters. I subsequently learned from Mr. Krivitsky that the Russian Peter was one Colonel Bykov, . . . and I prefer to refer to him as Bykov hereafter to avoid confusion between the pseudonym and the name J. Peters. . . . I should think in August or the early fall of 1937 I arranged a meeting between Alger Hiss and Colonel Bykov. . . . "

*The documents referred to were State Department documents (R. 511-2).

One item in the Bykov story (told with typical circumstantial detail) is demonstrably false. Appellant's brother Donald did not enter the State Department until February 1, 1938, and had never considered going there until October or November, 1937, when the subject was broached to him by Sayre and Dickover of the State Department (R. 1703-4). Even apart from this demonstrably false item, there is strong ground for concluding that Chambers' whole Bykov story is a figment of psychopathic imagination, invented within the last few years.

There is in the record an extract from an FBI report of an interview with Chambers on June 26, 1945 (R. 558-9), read to the jury at R. 561, from which we quote (R. 559):

> "Continuing Chambers related that other people whom he met while in the company of Peter included an individual whom he believed to be connected with the Russian Intelligence System, who was later identified to him as Boris Bykov by Krivitsky. He recalled that during 1936 he met Peter one time in a theatre which he could not recall. Peter was accompanied by a man about 5 feet 7 inches tall, red hair, slightly baldy, Jewish, very shifty appearance, who spoke very little English and poor German, was approximately 36-37 years old in 1937. He explained that Peter introduced him to this man, giving him some first name which he could not recall, and that he had sensed that this man was connected with the OGPU or Russian Intelligence because he had believed that he had been introduced to the man so that he could size up Chambers. In this connection he also stated that on numerous occasions when he entered a restaurant with Peter he would become conscious of someone watching him from across the room who would get up and walk out of the restaurant after having observed closely. He explained that it was his impression that these men may have been secret agents of Peter who were instructed to check up on Chambers' activities and his personal life."

Chambers attributed to the Bykov of his present testimony the physical characteristics of the Bykov of the FBI interview (see R. 493). There is every reason to believe that the Bykov of the FBI interview was a real person (see R. 560). If that is true, the Bykov of Cham-

bers' present testimony, and the story built around him, are the fictitious products of Chambers' mind. In the FBI interview it was Peter who was in a theatre with Bykov and there introduced Bykov to Chambers; now it is Chambers who took appellant to a theatre and there introduced him to Bykov. Chambers met the real Bykov only once, and Bykov's apparent function was (as one of Peter's secret agents, or a secret agent of the OGPU) to observe and check up on Chambers; in the present testimony, Bykov is Chambers' superior and co-worker, to whom he regularly reported. [The identity of the Peter of the FBI interview is not disclosed in the extract read at the trial. Perhaps he is the same as J. Peters (*cf., e.g.,* R. 233); but his identity is immaterial, since obviously in the FBI interview he is not Bykov.]

There is further evidence, in Wadleigh's testimony, that Chambers' story about Bykov and appellant is a product of Chambers' imagination. We have mentioned Wadleigh's testimony that Chambers introduced him to "Sasha", and intimated that Sasha was Chambers' "boss in the apparatus". Chambers identified Sasha with the Bykov of his present story (R. 408), as he had to do if he were to avoid attributing two heads to the same apparatus. If the Bykov of Chambers' testimony had been a real figure, the real boss of the apparatus, Wadleigh's testimony would have supported Chambers'; in fact it controverts it. The real boss, whom Wadleigh met, had only one arm (R. 1130, 1169, 1178); Bykov had two (R. 493).

If Chambers' Bykov-Hiss story, central to his whole story of appellant's alleged espionage, is a product of psychopathic imagination, as we believe we have shown it to be, his whole testimony against appellant is discredited.

Equally revealing, though less centrally important,* is Chambers' testimony that he obtained State Department documents from appellant while appellant was working for the Nye Committee. Appellant's testimony was that he first met Chambers when Chambers came to see him at the

* The alleged events were before the period of the indictment.

Nye Committee offices, Chambers introducing himself as George Crosley, a free-lance writer. Chambers seized on appellant's connection with the Nye Committee to offer a story that appellant obtained for him (for the Communists), from Mr. Green of the State Department, "confidential documents from the State Department dealing with some angle of the Munitions Investigation", and that Chambers photographed those documents for the Communists (R. 239, 574-9). According to Chambers' "recollection", the documents were original papers (R. 574-8).

Appellant denied the story (R. 1844-5). Joseph C. Green, the official of the State Department who had been in charge of its relations with the Nye Committee, testified that no original documents went from the State Department to the Committee (R. 1455), and that no documents of any kind were given by him to appellant, with whom he had no business dealings during that period (R. 1456). Green testified also that of all the thousands of documents, copies or paraphrases of which were furnished by the State Department to the Nye Committee, only about twenty were not published, and those not for "security reasons" but for reasons of "international courtesy, in a desire not to publish communications from a foreign government without the permission of that foreign government" (R. 1462).

But we are interested as much in the internal inconsistencies of Chambers' story as in its actual falsity. Attempting, as usual, to give circumstantial color to his fabrications, Chambers testified that he photographed the alleged Nye Committee documents in appellant's P Street house, either when he and his family were staying there or perhaps at a later date (R. 250, 640-1). But Chambers' and Mrs. Chambers' testimony placed their stay at the P Street house after their stay at Smithtown, *i.e.*, some time after Labor Day, 1935 (R. 248-9, 961, 997); and appellant left the Nye Committee for the Department of Justice in mid-August (R. 1814). There is, finally, a striking inconsistency between Chambers' Nye Committee story and his testimony regarding his alleged introduction of appel-

lant to the subject of espionage activity in the fall of 1936, over a year later (R. 253, quoted more fully above):

> "I don't remember whether I told him originally that Peter wished him to turn over documents to the apparatus or not or whether I introduced the subject more gradually."

With this introduction we return to the psychiatric expert testimony; but we may here, as we could not in Point I, rely on the diagnosis of Chambers' case. While the jury were not bound to accept the uncontradicted diagnosis of two qualified experts, that diagnosis cannot be disregarded here. The testimony of both was based on a hypothetical question (R. 2526-49) the larger part of which was a summary of facts testified to by Chambers himself (R. 2870), and on the reading of certain of Chambers' writings and translations which are in evidence. Dr. Binger's testimony was based also on his observation of Chambers on the witness stand (R. 2524-5, 2549-50). Both experts testified that the material made available to them in these ways was sufficient for a valid diagnosis (R. 2618, 2769, 2810-1, 2814, 2858-9, 2863), Dr. Binger giving persuasive reasons why examination by direct interview might, in the particular circumstances, have added nothing useful (R. 2614-8), and Dr. Murray stating that the images that he found in Chambers' writings (*e.g.*, R. 2828-9, 2948) satisfied the requirements of his method of diagnosis (R. 2814, 2826). Their diagnosis was that Chambers suffers from the mental ailment of psychopathic personality of the type characterized by amoral, asocial and delinquent behavior, *i.e.*, behavior which has no regard for the good of society and of individuals and which is therefore frequently destructive of both (*e.g.*, R. 2550, 2695, 2812, 2823, 2824, 2866, 2882, 2946-7), with a history of theft, pathological lying, deceiving, bizarre or eccentric behavior, false accusations, a disposition to smear, degrade and destroy, abnormal emotionality, instability of attachments, and paranoid ideas (*e.g.*, R. 2563-79, 2685, 2818-26).

We cannot undertake here even a partial summary of the expert testimony, which extends over several hundred pages; it must in any event be read as a whole (including the attempt made on cross-examination to break it down) to obtain its true effect. The experts, of course, could not properly, and did not purport to, testify on the ultimate issues of fact in this case (R. 2570-1, 2580-1 2888-9); and they agreed that psychopaths do not always lie or falsely accuse (R. 2595, 2598, 2696, 2888-9), though they are likely to (R. 2913; see R. 2696). Thus we do not argue that the expert testimony in itself conclusively destroys Chambers' testimony. We do say that it gravely compromises it.

Beyond what this testimony proves, it suggests a particular conclusion which a trier of the facts could reasonably reach. There is in evidence Chambers' 1929 translation of "Class Reunion" by Franz Werfel (Def. Ex. O). Dr. Binger pointed out "the extraordinary analogies", of "medical significance", between the story of that book and facts stated in the hypothetical question (R. 2575, 2745-9). It is not unreasonable to conclude that Chambers, in his psychopathic imagination, assumed the role of Sebastian (in "Class Reunion") and assigned in his imagination the role of Adler to appellant. It is consistent with this conclusion that Chambers translated rather than wrote the book,—the material facts are his close knowledge of the story in which the roles occur, and the tendency of a psychopath to assume a role (R. 2567) and to believe fully the role that he adopts and the roles that he assigns to others (R. 2552-3).

There is strong evidence of a more usual kind impeaching Chambers' credibility. He is an admitted perjurer.

In 1935 he filed an application for a passport under the name "David Breen" (one of a number of his false Communist names); that application was replete with perjured statements, and ended with a false oath of allegiance (R. 313-8; Gov. Ex. 29; Def. Exs. A, B, D).

In the fall of 1937, and according to his testimony as one of his preparations for breaking with the Communist Party (R. 260-1), Chambers applied for a job with the WPA (R. 260-2). His application was replete with false statements (R. 272-3, 522-8; Gov. Ex. 5). Acceptance of the application by the Government was followed again by a false oath of allegiance (R. 529-30; Gov. Ex. 6), at a time when Chambers, having decided to leave the Communist Party, was no longer an atheist (R. 380, 530).

Chambers testified before the House Committee that he had no evidence of espionage (R. 296, 355). Before the Grand Jury that indicted appellant, Chambers testified on October 14, 1948, that he had no information or knowledge of any individuals in the employ of the Government furnishing information to any unauthorized sources, and that in connection with his activities with the Communist Party he did not obtain any information from any individual (R. 348-9). On October 15, 1948, he testified before the Grand Jury that he did not believe that he knew the name of any person who was guilty of espionage against the United States (R. 350-1). Chambers admitted that he either lied to the Grand Jury or lied before the jury in this case (R. 350-2). The undisputed evidence regarding Chambers' own espionage, and Wadleigh's, demonstrates that Chambers committed perjury before the House Committee, and before the Grand Jury in October.

That Chambers committed perjury at the present trial with regard to his charges against appellant has, we submit, been demonstrated throughout this brief. There remains for comment the fact that he has shown, in his testimony at this trial and elsewhere (mainly on the issue presented by the Government of alleged close association between the Chamberses and the Hisses), knowledge of some things about the Hisses that were in fact true. We mention, for example, the facts, all undisputed, that appellant was interested in bird-watching (see R. 564), that appellant's wife voted the Socialist ticket in 1932 (see Gov. Ex. 18, p. 4), that the Hisses had a friend named Plum

Fountain (see R. 457),* and that in 1935 appellant had made a down payment on a farm at Westminster, Maryland (see R. 265-6).** As is true of the other things of this sort that Chambers knew, these are clearly things that might have been mentioned casually at the time Chambers and the Hisses concededly saw each other.

The Chamberses testified in the Maryland action, at the first trial and at this trial about various details of the arrangement and furnishings of the Hisses' P Street, 30th Street and Volta Place houses. Before the House Committee Chambers said nothing about the internal arrangement of any of the houses except P Street that could not have been observed from outside; as to furnishings, all he recalled was a small leather cigarette box (see R. 542-5). The testimony of both Chamberses on the later occasions varied, generally in the direction of expansion, but with retraction as it appeared that the true facts did not fit the earlier testimony. [For example, before the House Committee Chambers testified that he was sure he had stayed in the 30th Street house overnight (R. 545). He repeated this testimony in the Maryland action on November 5, 1948, saying then that he might have stayed as many as ten times, sleeping in one of three bedrooms (R. 490-1). Having been told by Claudie Catlett in February, 1949, that there were only two bedrooms at 30th Street, one the Hisses' and the other Timothy Hobson's (R. 1571), Chambers testified here: ". . . I have no clear recollection of spending a night there . . . I have no vague recollection either" (R. 490).]

There is no need to look for explanation of the Chamberses' knowledge of the arrangement and furnishings of the P Street house; they concededly stayed there. This leaves for consideration their testimony as to the 30th Street and Volta Place houses. So far as their descriptions were accurate, the record shows several probable

* Chambers' testimony that he had met Miss Fountain was denied by her (R. 1786, 1787-8, 1790-1).

** Chambers' testimony that he had seen the farm with appellant was denied by appellant (R. 1902).

sources (apart from other possible sources) of their information. There were, first, meetings between Chambers and the Hisses' two maids, Claudie Catlett and Martha Pope,* arranged by the FBI in February, 1949. Chambers, asked whether he had talked to these maids about the interior of the houses, answered: "It would be more correct to say I asked questions about the interior" (R. 673). [See also as to these meetings R. 462-72, 1545-50, 1570-2.] Second, Olivia (Plum) Fountain Tesone, a friend of the Hisses and an architect, testified that the FBI had asked her "a good many detail questions about the various houses the Hisses had occupied" (R. 1785-6); we have already mentioned the months of all-day conferences between the FBI and Chambers running into March, 1949. Third, Teunis F. Collier, a contractor-builder who had remodeled the 30th Street house just before the Hisses' occupancy and worked on the Volta Place house over a period of years, testified that he had drawn for the FBI plans of the 30th Street and Volta Place houses as they were when the Hisses occupied them, and plans of the Volta Place house as altered after the Hisses vacated it (R. 1734-42).

Besides these explanations of how the Chamberses obtained what accurate information they had, the record demonstrates, through some of their inaccuracies, that the Chamberses based at least part of their testimony not on recollection of the houses as they actually were when the Hisses occupied them, but on later observation (by them or someone else). Thus Mrs. Chambers testified that the 30th Street house "had a white or off white color" (R. 966). Collier testified that his company had painted the house gray in 1942 (R. 1748), and that its color at the date of the Hisses' occupancy was yellow (R. 1747). Geoffrey May, who occupied the companion house next to the Hisses' 30th Street house during their occupancy (R. 1525), confirmed that both houses were a "bright yellow" at that time and were later painted gray (R. 1528).

*Since Martha Pope left the Hisses' employ before they moved to 30th Street, Chambers' interview with her could have been a source only of testimony as to furnishings, which he doubtless did not remember in detail from the time that he saw them at P Street or 28th Street.

B. Appellant's Case Was Strong

Despite the severe handicap of having to search memories and seek documentary evidence to refute the shifting and elusive Government testimony of events alleged to have occurred long ago, appellant has produced (besides the evidence of the documents themselves) convincing factual evidence, including the testimony of many disinterested and unimpeachable witnesses in his behalf.

The problem he has faced, and his success in meeting it, may be illustrated by further discussion (beyond what was relevant to Point I) of the alleged Peterboro trip.

Appellant and his wife supplemented their denial of Chambers' story, first, by their testimony that during the period of the alleged trip they were in fact at Chestertown, Maryland, where Mrs. Hiss's son Timothy was at a camp run by the Kellog Smiths (R. 1853-8, 2091-2, 2313, 2318, 2385), appellant being on vacation, and his wife having completed her course at the University of Maryland (R. 701-2, 1854, 1858-9, 2313-4). They testified also that they were there daily, Timothy having broken his leg in February, and being still lame (R. 1886, 2091-2, 2320). Their testimony was supported by that of Mrs. Kellog Smith (R. 1775-6, 1779-80).

It was, further, established by the testimony of Thomas Fansler, appellant's brother-in-law (R. 1688-91, 1693-4, 1696-7, 1699), that on the morning of Monday, August 9, 1937, when Chambers testified that the Hisses left Washington with him for Peterboro, the Hisses were in fact driving Fansler from Chestertown to the Wilmington railroad station (R. 1690-1, 1693-4), Fansler having come to Chestertown for the first week-end after his return from abroad to see his daughter, also one of the Kellog Smith campers, who had recently recovered from pneumonia.

The Government sought to counter this testimony. First, it introduced testimony by Henry Norman Grieb, a camp counselor, that at one time the Hisses did not come out to the camp for a couple of days, and that Timothy was upset about it (R. 3014-5). But this testimony was obviously irrelevant, for Grieb put the short absence, according to

his recollection, at a time when the Hisses "had just gotten down" to Chestertown (R. 3015);* and the week of the alleged Peterboro trip was the last week of appellant's four-week vacation (R. 2973). Second, appellant, his wife and Mrs. Kellog Smith having testified according to their recollection that Timothy had not gone to Washington during the summer (R. 1783, 1858, 2092, 2385-6), the Government introduced testimony of Dr. Margaret Mary Nicholson, Timothy's pediatrician, that she had seen Timothy in Washington on August 15 (R. 2554). But Dr. Nicholson's testimony, which in any event has nothing to do with the time of the alleged Peterboro trip, proves nothing more than that the memories of the Hisses and Mrs. Kellog Smith are not infallible as to events more than twelve years old. Reconstructing from the evidence of Dr. Nicholson's office entry, it is reasonable to believe that, August 15 being the last day of appellant's vacation (R. 2973), appellant's wife drove him from Chestertown to Washington, and took advantage of that occasion to take Timothy along to see his doctor. This one-day excursion could easily have been forgotten (see, *e.g.*, R. 2385-6). If anyone had remembered it, there could be no conceivable reason for concealing it.

Besides disproving Chambers' Peterboro story by proving that he was in Chestertown at the time, appellant disproved it by the evidence of Mrs. Lucy Elliott Davis (R. 1670-9), who had opened Bleak House for operation on August 1, 1937. Mrs. Davis testified that it was her practice to have guests register in the guest book on arrival (R. 1673). The guest book (Def. Ex. V) showed no entry which could represent Chambers and the Hisses under their own or any other names (see R. 1678). Mrs. Davis testified that she had never seen either appellant or his wife until the first trial and, being shown a picture of Chambers, that she had never seen him (R. 1675).

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*The time when Timothy was "upset" appears to have been when he was first brought to camp in June (R. 3015, 3016).

Appellant did more than disprove Chambers' allegations.

First, he called "witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crime[s] with which he [was] charged" (*Edgington* v. *United States,* 164 U. S. 361, 363 [1896]), in this case espionage as well as perjury. His character witnesses, many of whom testified also on factual issues, were: Philip C. Jessup (R. 1157), G. Howland Shaw (R. 1328), Harry C. Hawkins (R. 1341-2), Stanley K. Hornbeck (R. 1358), Clarence E. Pickett (R. 1384-5), John W. Davis (R. 1430), Gerard Swope, Jr. (R. 1435), Charles F. Darlington (R. 1445), Joseph C. Green (R. 1457), Francis B. Sayre (R. 1493-4), Geoffrey May (R. 1530), John L. Hall (R. 1556), Judge Calvert Magruder (R. 1756), Margaret Kellog Smith (R. 1778), Olivia Fountain Tesone (R. 1788-9), Doris Hill Soule (R. 1793), Marie Willcox Abbott (R. 1797-8), Judge Charles E. Wyzanski, Jr. (R. 2124), Admiral Arthur J. Hepburn (R. 2273), Clyde Eagleton (R. 2421), William L. Marbury (R. 2462), James T. Shotwell (R. 2844-5) and Clark M. Eichelberger (R. 2959).

Second, he established that his actual attitudes and actions had been always in his country's interest and, where that diverged from Russia's, against Russia's. Sayre, testifying about commercial negotiations with Russia in which appellant participated, said (R. 1496):

> "I never saw him trying to influence us in either a pro or anti-Russian policy. That is, it was always on the basis of what best comports with American interests."

Within the limitations of the rules of evidence, Sayre gave other favorable testimony at R. 1485 (see also R. 1483-4). In September, 1939, shortly after the Hitler-Stalin Pact, appellant prepared, on his own initiative and on his own time, a memorandum taking the position that international law permitted aid to the Allies; he took the matter up with Judge Hackworth, the Legal Adviser, Hornbeck and a number of others in the State Department (R. 1834-7). Appellant's personal file copy of this memorandum is in evidence as Defendant's Exhibit 4xK (see also Def. Ex.

4xK-1). Eagleton, Professor of International Law at New York University, to whom appellant had sent a copy of his memorandum, testified (R. 2415-20) to conversations with appellant in the fall of 1939 on this subject and on the subject of repeal of the Neutrality Act, which then stood in the way of full aid to the Allies, and testified that appellant shared his view that the Act should be repealed (R. 2418). Eichelberger, presently Director of the American Association for the United Nations, testified that he had been introduced to appellant by Sayre in 1936 or 1937 (R. 2952), that he had been working for revision of the Neutrality Act from 1936 on (R. 2953), that in 1937 he had discussed that question with appellant (R. 2953), and that he did so frequently thereafter, to and after the Hitler-Stalin Pact (R. 2954). Eichelberger also brought down to a later period appellant's activity in the American interest against the Russian, testifying to appellant's active participation in the formation and activity of the Committee to Aid the Marshall Plan (R. 2954-7; Def. Ex. 6xQ).

C. Other Aspects of the Case

There was in this case an unusual combination of circumstances emphasizing the necessity of utmost care lest appellant's interests be unfairly prejudiced.

The length of the trial and complexity of the issues, illustrated in the foregoing discussion, made it exceptionally difficult for the jury to exercise their function.

Other risk of unfair prejudice was inherent in the nature of the charges. Since the charges included Communist Party membership, the common knowledge that Communist doctrine calls for denial of Party membership and for the lie as an instrument of strategy placed appellant under a grave handicap. Since the charge was one of clandestine Communist espionage, every objection involved the risk that it would seem to the jury an attempt at concealment,—an effort to exclude on technical grounds evidence which if admitted would be seriously damaging. Since the charge was one of perjury, every challenge to credibility had a dual effect.

Appellant was under the practical necessity of attempting to prove the negative of the Chamberses' many assertions of things alleged to have occurred long ago,—with the risk that failures or discrepancies of memory and the natural unavailability of documentary evidence might strike the jury as sinister.

This is a cause celebre. The material on the motion for a change of venue (pp. 1-2, *supra*) is evidence of this; and it is matter of public knowledge that the case had its origin in widely publicized Congressional hearings. No juror, however responsible in his intentions, could be unaware of the public position that he occupied,—with the concomitant risk of abuse if he took an unpopular view.

All these factors made it essential that the case be tried with the utmost care for the protection of appellant's proper interests.

POINT IV

There was error in allowing a witness who it was known would claim the privilege against self-incrimination to take the stand, in the admission of evidence, and in the denial of motions to strike the testimony of several witnesses including a witness in rebuttal whose testimony should have been admitted only on the Government's main case.

A. Appearance of William Rosen as a Witness

We must first discuss evidence, not previously mentioned, involving a 1929 Ford owned by appellant in 1935 and part of 1936. The certificate of title in appellant's name (Gov. Ex. 49) bears on its reverse printed forms of "assignment of title," "reassignment to be used by registered District of Columbia dealers only," and "purchaser's application for new certificate of title." The first of these shows an assignment executed by appellant on July 23, 1936, and verified by him before W. Marvin Smith, notary public, appellant having first filled in in his hand the name of Cherner Motor Company as purchaser, and its address.

Cherner Motor Company is the largest Ford agency in Washington (R. 778), and appellant knew of it as one of the largest (R. 1881). The form of reassignment of title shows a reassignment executed the same day, July 23, by Cherner Motor Company (by L. A. Mensh) to William Rosen of 5405 13th Street, N.W. Mensh was a vice-president of Cherner (R. 775-6); his verification of the reassignment of title was taken by Henry J. Girtler, treasurer of Cherner (R. 780), as notary public. The form of purchaser's application, dated the same day, is signed with the name William Rosen, and the verification again taken by Girtler.

Mensh testified that his company had no records for 1936 except invoices (R. 785), and that an examination of the invoices for July 22, 23 and 24, 1936, running in consecutive numbers with none missing, showed no record of the transactions shown on Government's Exhibit 49 (R. 776-7, 782). Mensh confirmed his signature to the reassignment of title (R. 777) but testified that he had no recollection of the transaction (R. 785), that he had no present idea who William Rosen was (R. 777), and that he did not know appellant (R. 778).

Chambers, asked whether he was ever given the Ford by appellant, testified: "No. I was given the use of it" (R. 246),—"I used it to drive around Washington and I once drove from Smithton . . . to Washington in it" (R. 246). Asked whether he knew what happened to the car, he replied, "I know what Mr. Hiss did with his Ford" (R. 246). Chambers testified that appellant "proposed to turn the car over to the open Communist Party for the use of some poor organizer"; that Chambers opposed it; that appellant brought up the question again and Chambers took it up with J. Peters, after which he told appellant "that Peters had agreed, although reluctantly, to have it turned over to the open party"; and, finally: "Mr. Hiss told me that he had turned the car over according to an arrangement made between him and Peters" (R. 247).

At the executive session of the House Committee on August 16, 1948 (during questioning about the man he had told the Committee he had known as George Crosley),

appellant, asked what kind of automobile Crosley had, replied (R. 2229):

> "No kind of automobile. I sold him an automobile. I had an old Ford that I threw in with the apartment and had been trying to trade it in and get rid of it. I had an old, old Ford we had kept for sentimental reasons. We got it just before we were married in 1929."

At the executive session of the House Committee on August 17 (which was the occasion of his identification of Chambers as the man he had known as George Crosley [R. 1986]), appellant testified further regarding the Ford. His testimony of August 16 was read into the present record at R. 2215-6 and his testimony of August 17 at R. 1991, 1994-6, 2002-3 and 2216-7. At both sessions he testified, according to his then best recollection (R. 2215, 2266), that his conversation with Chambers was before the sublease of the 28th Street apartment, and that at that time he already had a Plymouth sedan and therefore had no need of the Ford (*e.g.*, R. 1991, 1994-5, 2215). These recollections were confused, especially in that appellant did not obtain delivery of his new Plymouth until August, 1935 (R. 1863); but appellant had had no opportunity before this testimony to look up his records as to dates (R. 1911, 2007-8), and at the August 17 session he testified, according to his best recollection "about something that occurred 13 years ago," that his sublease to Chambers was for the summer months of 1935 (R. 1991) when in fact it was from about May 1 to July 1.*

After opportunity to refresh his recollection from records (R. 1911-2), appellant testified at this trial that, before or during the time of the 28th Street sublease, Chambers had spoken to him about wanting a car, and he had told Chambers that, when he acquired a new car he was contemplating buying, Chambers could have the Ford; that the Ford was worth $25 or $30; that appellant purchased a Plymouth, taking delivery in August, 1935; that he then, in accordance with his earlier promise, turned the Ford over to Chambers, who kept it for a few months; that ap-

*His then recollection also was that the 28th Street apartment was on 29th Street (R. 1990, 1994).

pellant kept the Ford on the streets of Georgetown (where he always kept his cars) through the following winter; that, at some time before appellant left P Street (*i.e.*, before June 15, 1936), Chambers took final possession of the car with the certificate of title (if he had not had the certificate before); and that appellant never saw the car thereafter (R. 1860, 1863-5, 1867, 1869, 2025-34, 2039, 2040-1, 2044).

Appellant testified that he had no recollection of executing the assignment of title on Government's Exhibit 49 (R. 1865) but that, since it was verified before W. Marvin Smith, a fellow-attorney in the Solicitor General's office, he concluded that it must have been brought for execution to him at his office during business hours (R. 1866, 1881, 2030-2); that apart from signing the assignment of title he had never had any dealings with Cherner Motor Company (R. 1881); that he had never seen William Rosen until he appeared in the witness chair at this trial (R. 1867); and that Chambers' story was false (R. 1867).

The Government makes much of the fact that the assignment of title was not executed until July 23, 1936, and argues that that is inconsistent with appellant's testimony that he gave the Ford to Chambers months before. We suggest, on the contrary, that the natural assumption at the time was that the old car, worth only $25 or $30, would be used by Chambers as long as its usefulness lasted; that the idea of Chambers' ever wanting to sell the car would not have occurred to appellant; and that the only function of the certificate of title (which appellant testified he turned over to Chambers for that purpose [R. 1864, 2027]) would be as evidence of the right of possession.

William Rosen, questioned before a grand jury as to any connection he may have had with the above matters, claimed the privilege against self-incrimination, and his claim was upheld by this Court (*United States* v. *Rosen*, 174 F. (2d) 187, C. A. 2 [1949], cert. den. 338 U. S. 851).

Defense counsel, knowing that the Government proposed to call Rosen as a witness, informed the Court in chambers

that Rosen's counsel had said that Rosen "would claim the privilege with respect to any questions pertaining to his membership in the Communist Party and with respect to any questions pertaining to his transaction involving the Ford car which at one time belonged to Mr. Hiss" (R. 859), and objected to Rosen's appearing as a witness (R. 860). The prosecutor accepted the reported statement of Rosen's counsel as a correct statement of Rosen's intention (R. 860). Asked by the Court whether, in view of this, he wished to call Rosen the prosecutor said he did (R. 860):

> "I propose to ask him about his address; about whether he was affiliated in any way with the Communist Party, and what he had to do with this automobile, if anything; whether he had any connection at all with Mr. Chambers, Mr. Peters or Mr. Hiss."

Over appellant's renewed objection (R. 922), Rosen was permitted to take the stand. After answering one question, regarding his present address, Rosen declined to answer on the ground of self-incrimination the succeeding seven questions, the first relating to his connection with the Communist Party in 1936,* and the remaining six relating to his possible connection with the transaction regarding the Ford car (R. 922-3). He answered in the negative questions whether in 1936 he knew J. Peters or Stevens (a pseudonym of J. Peters') and whether in July, 1936, he knew appellant (R. 923-4). [Despite his statement in chambers, the prosecutor did not ask Rosen "whether he had any connection at all with Mr. Chambers" (R. 860, 922-4).] The Court sustained the witness's claim of privilege (R. 924) and stated (R. 925):

> "I want to state to the jury now that you are to draw no inference unfavorable to this defendant because of the fact that this witness Rosen has claimed immunity."

This Court has recently said that it might "be ground for reversal if the party who called a witness connected with a challenged transaction knew, or had reasonable cause

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*The witness having answered in a low voice, the prosecutor said "I don't know whether the jury heard this", and had the reporter read the answer.

to know, before putting the witness on the stand that he would claim his privilege" (*United States* v. *5 Cases, Etc.*, 179 F. (2d) 519, 523, C. A. 2 [1950], cert. den. 339 U. S. 739).

In the present case, what happened on the witness stand was precisely what the colloquy in chambers foreshadowed with practical certainty. The witness testified to nothing relevant to the case against appellant; but the prejudice to appellant of his appearance and claim of privilege was extreme. Since the witness had been called by the Government to testify against appellant, the jury, who would inevitably infer from the claim of privilege the witness's own unlawful conduct, would naturally infer also that, had the privilege not been claimed, his testimony would implicate appellant. Indeed, the very logic of the Court's admonition that the jury should "draw no inference unfavorable to this defendant" is that the jury, unless so admonished, would naturally draw such an inference.* But the damage, once done, could not be so easily cured.

The prosecutor went further in summation (R. 3228):

> "Then Mr. Chambers said he had a Ford and that he used to use it; then he said he remembered that Mr. Hiss wanted to give it away to the Communist Party so some poor worker could use it. Well, what happened with that? . . . Mr. Hiss's assignment of title; he wrote the name in himself. Then we look at the Cherner books, 'We haven't got any record of it; no records are missing; they are all in consecutive order; that is our name; that is my signature,' and it ends up with Rosen.
>
> Now, does that corroborate what Mr. Chambers says? 'He had a Ford; he wanted to give it to the CP; he asked me; I asked Peters; he was opposed to it; finally we said "All right, go ahead if you want to do it". We don't know what happened to it.'
>
> You saw what happened to it. Corroboration: . . . Ford, disposition of the Ford."

There is no evidence in the record that Rosen is or ever was a Communist. Unless, therefore, the jury inferred

*See also the following sentence from the Court's instructions to the jury (R. 3267): " . . . The reluctance of a witness to incriminate himself may not be used to incriminate another. . . . "

from his claim of privilege that he was a Communist, there is nothing in which they could find support for the essence of Chambers' story,—that appellant gave his Ford to a Communist Party worker. Thus the prosecutor's argument to the jury was in flat disregard of the Court's admonition that no such inference should be drawn; it "was a plain invitation to the jury to follow his example and likewise disregard it" (*Skuy* v. *United States,* 261 Fed. 316, 319, C. A. 8 [1919]); see also *Waldron* v. *Waldron,* 156 U. S. 361, 383-4 [1895]).

On this record, it cannot be thought that the damage was cured by the Court's instructions to the jury (R. 3267).

B. Testimony of Felix Inslerman and Frederick E. Webb

We have discussed in Point I the evidence of Inslerman and Webb, and have shown that it was wholly unconnected with appellant. We argue here that the admission of this evidence was prejudicial error.

In chambers before Inslerman testified, defense counsel objected to his taking the stand, basing the objection on a report that Inslerman would claim his privilege against self-incrimination and on the ground that his testimony would in any event be immaterial and irrelevant (R. 1057-8).* The prosecutor declined to be interrogated as to the anticipated claim of privilege; as to relevance, he said that Inslerman's testimony would corroborate Chambers and contradict the defense theory "that Mr. Wadleigh was the one . . . who took the papers in question" (R. 1058).**

Inslerman's testimony (R. 1256-60) and Webb's (R. 1301-8),*** and the related testimony of Chambers, have been summarized in Point I; we add here that Inslerman identified himself as an Estonian, and confirmed that a voting

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*The statement of defense counsel at R. 1260 (in connection with his objection to the introduction of Government's Exhibit 51), " . . . I haven't objected to any of this testimony . . . ", is obviously to be interpreted as meaning that he had not, in view of the overruling of his objection taken in chambers, objected again after Inslerman's actual appearance as a witness.

**The prosecutor was presumably referring to Chambers' testimony that the documents he obtained from Wadleigh were photographed by Carpenter, not Inslerman (see R. 405).

***The defense objected to Webb's testimony as immaterial and irrelevant (R. 1303).

register for 1933 showed that he registered as a Communist, though he said he had no recollection of it (R. 1259). Webb's testimony, it will be noted, was wholly dependent on Inslerman's identification of his camera.

The prosecutor's claim of relevance for Inslerman's testimony (and Webb's) was plainly unfounded. The defense did not challenge Chambers' testimony that Inslerman photographed documents for Chambers on microfilm. Neither Inslerman's evidence nor Webb's tended to support Chambers' further testimony that the documents Inslerman photographed came from appellant. Webb proved that Government's Exhibits 11 and 12 were photographed on Inslerman's camera, as Chambers had said; but appellant's alleged connection with the documents there photographed rested (after Inslerman's and Webb's testimony, as before) wholly on Chambers' testimony.

But if the prosecutor could suggest any other ground of relevance, we submit that the evidence of these witnesses should in any event, and beyond any question of the exercise of discretion by the Court, have been excluded on the ground that its prejudicial effect far outweighed any probative value (see *United States* v. *Krulewitch,* 145 F. (2d) 76, 80, C. A. 2 [1944]). There was a specious relevance likely to impress the jury,—to persuade them that if Chambers had testified truly that Inslerman had photographed the documents he must also have testified truly that appellant had given him the documents. The likelihood of this effect on the jury was greatly increased by the prosecutor's claim of corroboration "to the nth degree", followed by defense counsel's statement that it would be on "an immaterial point", and the Court's ruling: "I should think it is relevant. The objection is overruled" (R. 1303).

The effect on the jury was, moreover, surely heightened by the introduction in evidence of the camera (Gov. Ex. 51) and Webb's photomicrographs (Gov. Exs. 52, 53).* There is "a natural tendency to infer from the mere production of

* Seven extra copies of Government's Exhibit 52 were given to the jury for their use in following Webb's testimony (R. 1305-6).

any material object, and without further evidence, the truth of all that is predicated of it" (IV Wigmore, 3rd Ed., p. 254). The Government's pains to produce the camera and to prepare the elaborate scientific proof tended to give Inslerman's and Webb's evidence special incriminatory significance in the jury's eyes.

Finally, the prejudicial effect of the evidence was heightened by Inslerman's claim of privilege on questions whether during 1937 he had met Chambers and photographed documents (R. 1258), and by the showing that in 1933 he had registered as a Communist (R. 1259).

C. Testimony of Mrs. Hede Massing

We submit that the Court committed prejudicial error in denying appellant's motion to strike the testimony of Mrs. Hede Massing (R. 1276-7).

Mrs. Massing testified to an alleged conversation with appellant at the Noel Fields' in Washington in the late summer or early fall of 1935. She admitted on cross-examination that she had never told anyone about this before she told the FBI in December, 1948 (R. 1296, 1301).* Her testimony as to the conversation was (R. 1266):

> "I said to Mr. Hiss, 'I understand that you are trying to get Noel Field away from my organization into yours,' and he said, 'So you are this famous girl that is trying to get Noel Field away from me,' and I said, 'Yes'. And he said, as far as I remember, 'Well, we will see who is going to win', at which point I said, 'Well, Mr. Hiss',—I did not say, 'Mr. Hiss'—'Well, you realize that you are competing with a woman', at which either he or I said, the gist of the sentence was, 'Whoever is going to win we are working for the same boss.'
>
> Now, as I say, I don't remember whether he or whether I said that, but this sentence I remember distinctly because it was very important."

Mrs. Massing testified that she had never met appellant before and never saw him again until she met him in the FBI office in 1948 (R. 1262-3, 1267, 1295).

*Mrs. Massing "probably" told the FBI that the conversation was either in 1934 or 1935 (R. 1296).

Mrs. Massing testified, about herself, that she was born in Austria, had been naturalized as an American citizen in 1927, had been married first to Gerhard Eisler, then to Julian Gumperz, and then to Paul Massing, had not been permitted by her first two husbands to join the Communist Party but was affiliated with it from about 1919 until she "broke with the Russians in 1937", and had worked for the Communist Party in this country, in "a Russian apparatus," beginning in 1933 (R. 1261, 1262, 1264, 1283-5).

Mrs. Massing's credibility was badly shaken. In her 1927 petition for citizenship, when she was admittedly affiliated with the Communist Party, she swore that she was not "affiliated with any organization or body of persons teaching disbelief in or opposed to organized government" (R. 1285; Def. Ex. HHH); and, in obtaining her passport used in frequent subsequent trips abroad as a "courier" at the expense of the Russians (R. 1287-8, 1291), she took the oath of allegiance (Def. Ex. SSS),—in her case clearly a false oath. As to her memory (which was allegedly clear with respect to the alleged conversation with appellant in 1935): she had no recollection of the dates of her marriage to and divorce from Eisler, as to which she had given differing versions on different occasions (R. 1281-3); and, being unable to remember testimony she had given in 1942 on her present husband's application for naturalization, she conceded "I have a bad memory" (R. 1277-8). As to a specific motive for her appearing against appellant: she admitted a plan of writing articles, with Eugene Lyons as ghost writer, to appear after the trial (R. 1274, 1276, 1291-2, 1293-4),—to which her sensational appearance as a witness would doubtless contribute value.

Assuming its truth, Mrs. Massing's testimony as to the alleged 1935 conversation is so vague as to have no relevant meaning on the issue on which it was presented,—the subsidiary issue of appellant's alleged Communist activity. The quoted conversation (the only element of Mrs. Massing's testimony connected with appellant) does not identify the "organizations" to which it refers; it identifies no person or cause as the "same boss" for which either Mrs.

Massing or appellant is alleged to have said that they were both working; it includes nothing about the Communist Party or about espionage. Only by assuming that it has already been otherwise shown that appellant was engaged in Communist activity can the conversation be read to refer to such activity. It has, therefore, no probative force of its own. On this analysis, the denial of the motion to strike was clear error (*cf. Steinberg* v. *United States,* 14 F. (2d) 564, 567-8, C. A. 2 [1926]). But even if on a strained construction of Mrs. Massing's testimony it is thought to be somehow relevant on the issue of appellant's alleged Communist activity, we submit that its probative value (discounted for the great doubt as to the witness's credibility) is far outweighed by the unfair prejudice to which her appearance and testimony gave rise; and the motion to strike should have been granted on that ground (see *United States* v. *Krulewitch, supra*). Mrs. Massing was a colorful witness, an admitted courier for the Russians, the former wife of Gerhard Eisler. "By virtue of the personality of the witness" her testimony would tend "to receive an excessive weight in the minds of the [jury]" (VI Wigmore, 3rd Ed., p. 491). As should have been expected when the motion to strike was denied, the prosecutor's summation enhanced the damage to be anticipated on this score (R. 3237).

For economy of space, we could not discuss Mrs. Massing's testimony both here and where, in Point III, we considered the weakness of the Government's case. We add here brief reference (relevant to that subject but concededly not to the argument under Point IV) to the testimony of Henrikas Rabinavicius, a witness for the defense (R. 2639-63), and to appellant's testimony.

Rabinavicius' testimony related primarily to a conversation at the Eugene Lyonses' in September, 1949,* in which Mrs. Massing gave another account of her alleged meeting with appellant (R. 2647-50, 2657-61). Mrs. Massing's account according to Rabinavicius was that her as-

* For Mrs. Massing's testimony as to this conversation see R. 1274-6, 1292-3.

signment in Washington was "to endeavor to contact young men in the Department of State", and that "Mr. X" (Noel Field), who introduced her to appellant, and appellant were both in the State Department at the time of the alleged conversation. [The record is clear that Noel Field had left the State Department by July 1, 1936 (R. 2964) to work with the League of Nations (R. 1524), and that appellant did not enter the State Department until September 1, 1936, so that there was no time when both were there.] Rabinavicius also quoted Mrs. Massing as saying that she "carefully concealed" from the young men in the State Department whom she was contacting "that she was either a Communist or Soviet Russian spy because that would have frightened them away from her" (R. 2648). Her statement at the trial, that either she or appellant said "Whoever is going to win we are working for the same boss", was not in the September version of her story (R. 2650).

Taken together, the two versions brand Mrs. Massing's story of the alleged conversation as a fabrication. Appellant denied it at the trial (see R. 1888, 1897-1901, 1909-10, 1933-5), as he had denied it to Mrs. Massing and FBI agents in December, 1948 (*ibid.*).

D. Testimony of Mrs. Edith Murray in Rebuttal

Mrs. Murray's testimony would have been admissible on the Government's direct case. It was, we submit, beyond the proper exercise of discretion by the Court * to admit it in rebuttal. Appellant moved on this ground to strike her testimony (R. 3177). The Court, stating that "it might more properly have been offered in the direct case, but I don't think that it should be excluded because it is offered in rebuttal . . .", denied the motion (R. 3177-8). We submit that this denial was prejudicial error.

Mrs. Murray testified that she had worked as maid for the Chamberses (under the assumed name "Cantwell") at St. Paul Street, Baltimore, from the fall of 1934 to the spring of 1935, and at Eutaw Place, Baltimore, from the fall of 1935 to the spring of 1936 (R. 3023, 3028-9). Re-

* Cf. *United States* v. *Hirsch*, 74 F. (2d) 215, 219, C. A. 2 (1934), cert. den. 295 U. S. 739.

ferring to Eutaw Place, she testified that the Cantwells "didn't have any visitors, only two visitors that I know of" (R. 3024), and she identified these two visitors as appellant and his wife, testifying with circumstantial detail about four visits by appellant's wife, including one when appellant accompanied his wife (R. 3025-7, 3028, 3030-4). The identification was made in the courtroom and by a roughly contemporaneous photograph of appellant's wife (R. 3025, 3026, 3028). On cross-examination, Mrs. Murray testified that she had been brought to the courthouse by the FBI on November 17, 1949, the first day of the trial, and, in the hall outside the courtroom, had identified appellant and his wife, apparently as they came out of the elevator (R. 3032-3), and, further, that before that event she had been shown pictures of appellant and his wife by the FBI * and told by the FBI, when she came to New York, "to see if [she] could recognize them" (R. 3032-3, 3056). For her further testimony regarding her first being shown pictures of appellant and his wife, including her first reaction to appellant's wife's picture ("It looked like—I thought maybe it was an actress or something" [R. 3032] —" . . . I said to myself, maybe it was in the movies . . . " [R. 3046]), and her first reaction on being shown appellant's picture ("I said—it looked like I had seen him, but I wasn't sure, I told him I wasn't sure" [R. 3051]—"I told him I did not know" [R. 3053]), see R. 3032, 3046-53, 3055-6.

The record discloses no excuse for the Government's not calling Mrs. Murray on its direct case (see *Marande* v. *Texas & P. Ry. Co.*, 124 Fed. 42, 46-7, C. A. 2 [1903]). The fact that she was in the Courthouse on the first day of the trial makes any reasonable excuse impossible.

The effect of the Government's postponing Mrs. Murray's testimony to the last day of a trial which had been in progress for over two months was two-fold. It deprived the defense of an adequate opportunity to con-

* Being asked by defense counsel to produce the picture of appellant's wife shown to Mrs. Murray by the FBI, the prosecutor replied "I haven't got any pictures . . . " (R. 3047). From this and Mrs. Murray's own testimony it is clear that the picture shown her by the FBI was not the contemporaneous picture, Government's Exhibit 35, which she identified at the trial (R. 3028, 3046, 3047).

trovert and impeach her testimony. The dramatic impact of the testimony at the close of the long trial surely gave it in the jury's eyes an effect wholly disproportionate to its intrinsic probative force. In the absence of any excuse for the delay, it can only be concluded that these were the intended, as well as the actual, consequences.

The severe injury to the defense of depriving it, through surprise, of the full opportunity to controvert and impeach is more than a matter of surmise. So far as was possible through improvised cross-examination, the defense showed strong ground for believing that Mrs. Murray's identification of appellant and his wife was "the result of suggestion and subconscious, though innocent, fabrication" (*Di Carlo* v. *United States,* 6 F. (2d) 364, 366, C. A. 2 [1925]). We have noted above the process (brought out on cross-examination) which led to the identification in court. Cross-examination developed also that in 1942 Mrs. Murray had a nervous breakdown, and that she was under a doctor's care for over a year (R. 3043-6). On direct, it appeared that Mrs. Murray had been taken by the FBI in November, 1949 (before her trip to New York on November 17), to see the Chamberses on their farm at Westminster (R. 3027-8). Cross-examination developed the circumstances of this visit (R. 3036, 3038-42), including the fact that it lasted for about three hours (R. 3042). During this time the Chamberses could have supplied by suggestion the circumstantial detail which gave Mrs. Murray's testimony much of its effect.

The dramatic effect of Mrs. Murray's testimony at the close of the case is self-evident. She was the only witness (other than the Chamberses) who testified to having seen appellant or his wife with either of the Chamberses on any occasion which Chambers or his wife had asserted and appellant and his wife had denied. To deprive the defense of the fullest opportunity, by investigation and prepared cross-examination, to controvert and impeach this testimony was, we submit, beyond the proper exercise of discretion by the Court as to the order of proof.

E. Testimony of John Foster Dulles in Rebuttal

Appellant moved to strike the testimony of John Foster Dulles on the ground that "it is directed to an immaterial point and therefore is not subject to rebuttal testimony or to denial" (R. 3177-8). We submit that the Court's denial of this motion (R. 3178) was prejudicial error.

On direct and cross-examination appellant testified to his recollection of certain conversations with Dulles, who was first a Trustee and later Chairman of the Board of Trustees of the Carnegie Endowment for International Peace. These included conversations in 1946 regarding appellant's prospective employment as President of the Endowment, conversations just after appellant's election as President, and later, regarding charges made to Dulles by one Kohlburg that appellant was a Communist, a conversation relating to an appearance by appellant before the Grand Jury in March, 1948, and conversations following the House Committee hearings of August, 1948, relating primarily to the question of appellant's resignation as President of the Endowment (R. 1904-6, 1928-30, 1931-2, 2070-2, 2077-81, 2106-7, 2112-3, 2200).

Dulles was called as a rebuttal witness. His testimony (R. 3071-83), read in connection with appellant's, shows no real contradiction on any significant point, but at most a difference of recollection. The only possible relevance of Dulles's testimony being hypothetical impeachment of appellant's credibility, it thus had no relevance.

But even if the testimony had been logically relevant it would have been inadmissible, since the subject-matter of appellant's testimony sought to be impeached was collateral (*Moyer* v. *Aetna Life Ins. Co.*, 126 F. (2d) 141, 144, C. A. 3 [1942]; *United States* v. *Sager*, 49 F. (2d) 725, 730, C. A. 2 [1931]).

The Government presented to the jury as its final witness a former United States Senator whose testimony, it asserted, contradicted appellant's. Every challenge to the credibility of a defendant in a perjury trial has, as we have suggested, a necessarily dual effect. Impeachment

of the kind here attempted, through an impressive public figure, was beyond question prejudicial.

POINT V

Appellant was deprived of a fair trial by the prejudicial action of the prosecutor.

Wherever the bounds of conduct permissible to a prosecutor may be fixed, the prosecutor exceeded them.

We present here illustrative instances of the prosecutor's inflammatory and prejudicial questioning of witnesses and argument to the jury, and of his direct statements or implications of fact unsupported by, and in many cases directly contrary to, the record.

As to these matters, defense counsel took no objection on the record.* The damage done by the question or argument was incurable, and objection would only have aggravated it; the number of instances, especially in the summation, rendered effective objection impossible and any attempt at objection harmful. The Court may notice without objection (see *United States* v. *Atkinson,* 297 U. S. 157, 160 [1936]; *Brown* v. *Walter,* 62 F. (2d) 798, 799-800, C. A. 2 [1933]; *Skuy* v. *United States, supra,* 261 Fed. at 320-1) misconduct of the kind that existed here.

In opening and summation, the prosecutor referred to the Grand Jury in such a way as to invite the jury to believe that the questions for their decision had already once been decided against appellant, and to invite them to follow that lead. Thus in the opening (R. 173, 177):

> "... Finally ... the grand jury here in this building ... heard ... the testimony of both Mr. Chambers and the defendant ... over a number of days, until finally on December 15th, 1948 Mr. Hiss testified and, as they say in their indictment, he lied to them on that day.

*Appellant moved for a new trial, after verdict, on these grounds among others (R. 3297-8). At the appropriate time appellant requested the Court to charge that the jury were "not to consider any assumptions or implications contained in questions asked by the Government's counsel of defendant's witnesses, including character witnesses" (Request No. 43, R. 3193); this request was endorsed by the Court "Will be covered" (*ibid.*), but the subject-matter was not included in the instructions given.

So you can see how . . . the grand jury, after listening to both of these men on a number of days—I am just guessing now, but I think ten, I might be wrong, but ten days—and they believed Chambers and not Hiss and they indicted Hiss for perjury for having lied to them under oath."

* * * * * *

"But when the chips were down in December in the grand jury, when the grand jury, a body like yourself—twice as many—called him and called Mr. Hiss, first one, then the other, first one, then the other—where was the truth here? Where was the truth? Did you or didn't you?

And they indicted Hiss."

Again in the summation (R. 3219):

"Now, ladies and gentlemen, the indictment here? . . . You have to find out whether Mr. Hiss lied twice while under oath upstairs here in the grand jury. Did he commit two lies deliberately before a body like yours, larger perhaps, but a group of New York citizens? . . . "

Since the perjury charged was alleged to have been committed before the Grand Jury, it was the prosecutor's duty to minimize the risk that the jury would give more weight to the indictment than it was entitled to. Instead he deliberately increased the risk. What other purpose could there be in detailing the length and character of the Grand Jury's deliberations (see also R. 3253-4), in referring to it as "a body like yours"?

The damage is clear. Certainly it was not cured by the Court's instruction that an indictment is not proof of guilt but only an accusation (R. 3264).

On direct examination Mrs. Chambers, answering a question how long it was since she had seen the prosecutor, volunteered (R. 960):

"I believe the last time I saw you, Mr. Murphy, was at our home on the farm when my husband—when you came to talk to him about the lie detector."

On appellant's cross-examination, the prosecutor reopened the subject (R. 2211):

"Q. Mr. Hiss, when you testified before the House Committee in Washington a year ago last August did

you refuse to submit to a lie-detector test? A. No, I did not.

Q. You did not? A. No.

Q. You were asked whether you would submit to a lie-detector test, were you not? A. That is correct.

Q. And did you say you would or would not? A. I wrote them a letter, Mr. Murphy, in which I said I would like to consider the matter at some length and consult people. I did not specifically refuse, no.

Q. Well, in any event you did not submit to a lie-detector test? A. No; they dropped the matter."

Reading into the record (R. 2211-2) an excerpt from the House Committee hearings (in which Congressman Nixon, stating that Chambers said he would take a lie-detector test,* asked appellant whether he would be willing to take one, and appellant stated his reasons for doubting the validity of such tests), the prosecutor continued (R. 2212):

"[Q.] . . . Is that what you refer to and say that you had consulted people and you were advised by them that they did not think it was scientific enough? A. After that I wrote the committee a letter. I think if you went on a little further you would find there was more about it.

Q. Well in any event you did not take the test? A. No; they dropped it, as I say.

Q. Well, you didn't come forward and insist upon it? A. No, I did not."

This interrogation, especially in a perjury case, was grossly improper. Appellant's doubts of the scientific validity of lie-detector tests are, so far as we know, shared by the courts of every jurisdiction that has considered the question (see III Wigmore, 3d Ed., p. 645, and, *e.g., Frye* v. *United States,* 293 Fed. 1013, C. A. D. C. [1923]; *People* v. *Forte,* 279 N. Y. 204 [1938]; *State* v. *Lowry,* 163 Kan. 622, 185 P. (2d) 147 [1947]). Yet the risk and hope were clear that the jury, ignorant of the scientific status of such tests, would draw a vitally prejudicial conclusion.

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*On the uncontradicted psychiatric testimony, psychopaths "have a conviction of the truth and validity of their own imaginations . . . " (R. 2552). Thus a psychopath may well volunteer to take a lie-detector test, however baseless his story (see R. 2568).

The prosecutor was guilty of unfounded charges that appellant and his counsel were following the Party line.

In his opening, referring to appellant's libel action against Chambers, and purporting to paraphrase Chambers, he said: ". . . when that lawsuit was started then he saw the Communist Party at work . . ." (R. 177). No evidence was produced that Chambers ever thought or said so. This was a pure appeal to prejudice, clear in intent and unsupported in fact.

In summation (referring to appellant's appearances before the House Committee and the Grand Jury) he repeated the theme (R. 3240):

> ". . . He had to admit or deny—admit or deny—fish or cut bait. If he admitted—bang. Everything crumbles at once, the job to boot. So you deny, you accuse, accuse the other guy, yell cop. That is standard CP practice, isn't it? Accuse the other guy, accuse me, accuse the Judge, everybody."

And again in summation, referring to criticism by defense counsel of the FBI (R. 3255):

> ". . . This is the open season on the FBI; everybody is taking potshots at them. It is the party line to do it. It is the party line."

These statements had a dual intent,—they were open assertions (without support even in Chambers' testimony) that appellant is now a Communist Party member; they were calculated to convey to the jury a concealed connection between the defense of this case and the defense of the Coplon case and the case of the eleven Communists. The phrase "accuse the Judge" can refer only to the "standard CP practice" employed against Judge Medina. The statement that it is "the party line" to criticize the FBI is a clear reference to the Coplon case.

It was especially prejudicial to answer legitimate criticism of the FBI by the illegitimate cry of "the party line". We have in this brief criticized, for example, the FBI's permitting Chambers to question Claudie Catlett and Martha Pope about appellant's houses (pp. 63, 77). Another instance of misconduct was disclosed by Mrs.

Norma B. Brown, sister of Joseph R. Boucot from whom the Chamberses (under the name "Breen") rented a cottage at Smithtown in 1935 (R. 248, 343-6, 1639-40). The Chamberses testified that Mrs. Hiss spent ten days at the cottage (R. 345, 1040). Mrs. Chambers testified that Mrs. Hiss met Boucot and Mrs. Brown (R. 1040). Boucot and Mrs. Brown denied it (R. 1641, 1652).

Mrs. Brown disclosed that an FBI agent had come to see her at a hospital, shown her a picture of Mrs. Hiss, and asked her "Does this look like Mrs. Breen?" (R. 1652-3). Mrs. Brown testified that at first she thought she recognized the person in the picture as Mrs. Breen, primarily by her hair, but that, thinking it over overnight, she was positive it was not (R. 1653-4); when she told the FBI agent the next morning, the agent admitted that it was a picture not of Mrs. Breen but of Mrs. Hiss (R. 1653-4). Appellant's counsel referred to this in his summation, temperately, as an instance "of overzealousness on the part of some representatives of the FBI" (R. 3123-4). There was no excuse for the prosecutor's meeting this with his vicious "party line" attack.

There were unfounded insinuations and charges that appellant and his counsel fabricated the defense.

In October, 1949, to learn whether Chambers had gone abroad during the period 1930-1939, counsel wrote to the State Department inquiring whether Chambers had secured a passport during that period under his real name or any of a number of assumed names (R. 160-1).* The Department replied that it had "been able to identify only one application in one of the names as pertaining to the subject of your inquiry", and that that would be produced at the trial upon receipt of a subpoena (R. 144-5). The defense served a subpoena (Def. Ex. 5xX) and secured an order requiring production before trial (R. 141-2). The Government moved to quash the subpoena (R. 145-9); the motion was denied (R. 161). Following this, and before the trial, there was exhibited to the defense for the first time the

*As this letter mentions, informal inquiry had been made in June.

false "David Breen" application dated May 28, 1935, which was introduced at the trial (R. 304-6; Def. Ex. D). The FBI had received from the State Department a copy of this same application in March, 1949, before the first trial (see Def. Ex. 5xS); but it was not mentioned there.

Knowing that the defense had discovered the application, the prosecutor elicited from Chambers at this trial, for the first time, a story that he had discussed with appellant in 1935 a contemplated trip "to England for work in the Soviet apparatus" (R. 249, 313).* Chambers also testified that he did not recall having told appellant about the passport (R. 249), that he did not go to Europe, and that the passport was never used (R. 251). Supported only by this testimony, the prosecutor persistently insinuated that appellant had known all along about the application (R. 2061-5). Appellant answered that someone (unidentified to him) had given Mr. Rosenwald, one of his counsel, a tip during the summer of 1949 that Chambers had been abroad during this period (R. 2062-3, 2064). Implying that it was appellant himself who had informed his counsel, the prosecutor continued the interrogation (R. 2062-5). At the beginning of each of the following two sessions, he asked appellant whether his counsel had told him who the informant was (R. 2065, 2125).** In the summation, innuendoes gave way to a direct charge (R. 3240, 3250):

> "And how about the tipster, the mysterious guy who told Mr. Rosenwald about 'Why not look in the Passport Section for the Breen passport?' How about that guy? Do you think he really existed? . . . "
>
> * * * * * *

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*As we have noted (p. 67), Chambers also told for the first time at this trial the related story that during his contemplated trip his wife and child were to stay with the Hisses (R. 249). A further embellishment, also "a first" at this trial (R. 339), was Chambers' testimony (R. 288-9, 319-20, 339, 341-2), supported by Mrs. Chambers' (R. 1064), that he wore a moustache at the time (his photograph on the false passport application having shown him with a moustache). For contradiction of this embellishment see, *e.g.*, the testimony of Mr. Boucot and Mrs. Brown (R. 1643, 1646, 1654).

**In answer to the last of these questions, and again on redirect (R. 2222), appellant testified (as the prosecutor should in any event have known) that he had not discussed any phase of the case with his counsel during cross-examination. Appellant also testified that he had not known anything about the passport application until shortly before this trial (R. 1862, 2239, 2267-8).

" . . . If Mr. Hiss didn't know, way back in 1935, that Mr. Chambers had applied for and obtained a passport in the name of David Breen when he was going to Europe on another Communist mission, how did they know to go to the Passport Division and ask for passports? They could have written to a thousand places. But why pick out the State Department for passports? . . .

Mr. Davis, their Washington representative, was there last summer. They knew it was there because they were friends together. He confided in him, he told him. . . . "

Thus on the basis of the flimsiest evidence, and on a subject which the Government itself refrained from raising at the first trial, the prosecutor argued that appellant was deliberately lying, and that his counsel's inquiry of the State Department was a deliberately fabricated cover.

There was no corroboration for Chambers' story regarding the rug (pp. 55-7, *supra*). Appellant's testimony and his wife's that Chambers gave him a rug in 1936 was confirmed by Claudie Catlett's that she had seen the rug at P Street (from which he moved in June, 1936) and had seen it again on a visit to his New York apartment with the secretary of one of his counsel (R. 1575-6). She was not cross-examined.

In summation the prosecutor discussed the testimony that we have shown to be non-corroborative and continued (R. 3229; see also R. 3241):

" . . . But just consider the rug by itself. . . . Mr. Hiss says, 'He gave me a rug; I have it; I have the damn thing. Clidi Catlett saw it. I have it in my home.'

Now, what would you do assuming you were unjustly accused, and the man said, 'Why, you got a rug from us,' and you had a rug but you did not get it from us? What do you do with the rug? You bring it in and say to Mr. Toulokian, 'Is this the damn rug?' No. Whom did they show it to? Clidi Catlett. Clidi Catlett said she saw the rug up here in the Village. The thing to do when you are unjustly accused is to come in and prove that that is not the rug. The Government can't go out and subpoena rugs belonging to the defendant. . . . Bring it in here. Let us look at it. Let the expert look at it. 'That is one of the four rugs I sold.' Bang. Guilty.

No, don't do it that way. . . . He could not bring the rug in because that proves Count II."

Here is another charge that appellant and counsel joined in fabricating the defense, suppressing evidence and suborning perjury by Claudie Catlett. But this is an instance also of another pervading vice of the prosecutor's summation,—"seriously injurious reference to incriminating matter not in the record" (*United States* v. *Toscano,* 166 F. (2d) 524, 527, C. A. 2 [1948]). The argument implies that the dealer Touloukian could have told, if he saw the rug, whether or not it was one of four rugs sold by him to Schapiro thirteen years before, and implies further that he would have identified it as one of the four. There is no basis in the record for either implication.

Nor is this all. The prosecutor's statement that the Government could not have subpoenaed the rug is contrary to the law; his implication that the defense would not have produced it voluntarily if he had asked for it is contrary to the fact. Counsel had said in opening that appellant would take the stand (R. 182). Waiving his privilege, appellant could not have objected to a subpoena (*United States* v. *Buckner,* 108 F. (2d) 921, 929, C. A. 2 [1940], cert. den. 309 U. S. 669). In fact, appellant voluntarily produced whatever in his possession the prosecutor requested (*e.g.,* R. 2008, 2034). If the prosecutor had believed that Touloukian could identify the rug as one of the four sold to Schapiro, he could easily have obtained it.

Defense witnesses, for example character witnesses, were also subjected to improper attack and innuendo.

Jessup, who in the preceding year had negotiated the lifting of the Soviet Union's blockade of Berlin (R. 1155, 1164), was cross-examined with the clear intent of conveying by innuendo doubts as to his loyalty and a suspicion of some improper relation with the Russians (R. 1158):

"Q. Do you recall being asked a question in your deposition which was taken in Paris last year whether or not you had ever met a person named Jacob Aranoff? A. I recall that name, yes.

Q. And your answer was that you did not recall any person of that name? A. That is correct.

Q. Has your memory been refreshed since at all? A. I have no recollection of that name."

There is nothing in the record to identify Jacob Aranoff, but his Russian name would be sufficient to convey the intended implication to the jury. Nor did the fact that Jessup had in his deposition on the first trial denied knowing Aranoff prevent the prosecutor's asking the question again. Jessup was questioned also about his association (or alleged association) with the Institute of Pacific Relations, the American-Russian Institute for Cultural Relations with the Soviet Union, the National Emergency Conference for Democratic Rights, and the China Aid Council (R. 1159-60), and about his wife's association with the last-named (R. 1158). It was a grave impropriety for the prosecutor, an official of the Government, to attempt in this way to impugn the loyalty of a high diplomatic official for the purpose of depreciating the value of his testimony.

Sayre, presently United States Representative in the Trusteeship Council of the United Nations (R. 1472), was asked: "Now will you tell this Court and jury whether or not Mr. Hiss had anything to do with getting you your present job?" (R. 1515), and this question was followed up (R. 1515-6). The implication that Sayre colored his factual and character testimony in return for appellant's helping him get his "job" was as indecent to Sayre as it was prejudicial to appellant.

In cross-examining Eichelberger, who had testified clearly that he had been associated with William Allen White's Committee to Defend America by Aiding the Allies (R. 2959), the prosecutor, by referring to the committee (organized during the existence of the Hitler-Stalin Pact) as "that committee to keep us out of war" (R. 2960), tried to convey to the jury the idea that Eichelberger's activities (and appellant's with him) were favorable to the Russian-German position, as the activities of American Communists at the time had been. He tried by questions about the American Youth Congress (association with

which Eichelberger denied), and about a Spanish Refugee Relief Committee (which Eichelberger explained), further to suggest a Communist tinge (R. 2960).

We add, as bearing on intent, reference to questions affecting two other character witnesses. Cross-examining Admiral Arthur J. Hepburn, former Commander-in-Chief of the United States Fleet, the prosecutor asked whether the Admiral had ever belonged to "the Green Bowl Society" (R. 2274). Admiral Hepburn's denial leaves no explanation for the question except the prosecutor's hope that the jury would draw from the exchange a suspicion of something discreditable. A similar hope apparently inspired a question during appellant's cross-examination about his check-book stubs (R. 2094):

> "Q. Now, I looked at some of those check stubs myself, and I see a few, four or five entries, to Magruder. Was that the Judge who testified, Judge Magruder?"

Magruder's is a Washington grocery store (R. 2095).

In summation the prosecutor distorted and ridiculed what some of the witnesses had said about appellant's reputation. Sayre testified, with precise accuracy, that opinion had been divided after August, 1948, but that up to then appellant's reputation had been "of the best" (R. 1493-4). In summation the prosecutor said: "Mr. Sayre, his boss, said it was evenly divided; half thought his reputation for integrity was good" (R. 3216; repeated at R. 3239). Judge Wyzanski testified that appellant's reputation was "the equal of that of anybody I have ever known" (R. 2124). The prosecutor said: "Judge Wyzanski didn't quite tell us. He said it is as good as anyone he knows, and he didn't tell us whom he knows" (R. 3216).

Finally, there is another instance of prejudicial matter with no basis in the record. First referring to Judge Manton's having been a defendant in the District Court (R. 3215), he added (R. 3217):

> "And Judge Manton, he had character witnesses. You might recall one of the character witnesses who testified in this trial was one of his."

The attack on the expert psychiatric testimony was in vital respects improper. The background was laid early. After argument in chambers, the Court held the testimony admissible, filing a memorandum which was not read to the jury (R. 2516-9). When Dr. Binger was called as a witness, the prosecutor restated his opposition before the jury (R. 2516). After preliminary cross-examination as to Dr. Murray's qualifications (R. 2806-11) he made before the jury the following statement (R. 2811):

> " . . . What I had in mind . . . is that he is prepared to testify to a personality. Now I submit if we get into the question of personalities any further we will be trying a lawsuit which will go down in history, your Honor, as just a burlesque on something we have never seen before."

The attack culminated in the summation. We comment on one point. The prosecutor said (R. 3218):

> "Now . . . psychiatry and psychology are . . . two respected branches of medicine; and I think you can assume that in the preparation of my cross-examination I had competent assistants. . . . A psychiatrist who has no bias, who studies a case with the aid of a psychologist who has applied tests . . . and tells us about the condition of a subject's mind where there is evidence that there is something wrong mentally, it is of great help. . . . But we do not have that here. There was no suspicion of anything wrong with Mr. Chambers' mind at all."

The last sentence is unsupported by anything in the record,—directly contrary to the only evidence in the record. The prosecutor went further. He asserted an opinion, contrary to the record, on a subject on which he could have had no valid opinion (R. 3219):

> "If I thought there was a serious question, a really serious question of the mental condition of Mr. Chambers, I suggest to you that the Government could afford competent psychiatrists. But I did not call any. I do not think the question attained that dignity."

Thus he told the jury, as clearly as if he had put it in words, that he himself had consulted experts and that the opinion he expressed was theirs. There is nothing in the

record to suggest that any expert had given Chambers a clean bill of mental health. But even if such an opinion had been expressed, the prosecutor had no right to repeat it to the jury without putting his hypothetical expert on the stand, subject to cross-examination. What he did is clearly within the condemnation expressed by this Court in *United States* v. *Toscano, supra.*

We have discussed (pp. 41-3) Feehan's testimony that Baltimore 5-9 and 11-47 were typed on the Woodstock, and have noted that Feehan was not asked his opinion as to the identity of the typist, and gave no opinion.

In summation, the prosecutor invited the jury to conclude from typing errors common to the Baltimore typed documents and papers typed by Mrs. Hiss that she was the typist (R. 3258). Apparently the invitation was accepted. Having retired at 3:10 on January 20, the jury at 5:00 requested, among other things, "Mrs. Hiss's letters written on typewriter", "Papers in evidence 5 to 47, etc.", and "FBI sample typing";* the request was repeated in substantially the same terms at 5:30; and these papers, with other material requested, were delivered to the jury early in the evening (R. 3277, 3278, 3280, 3282-3).

There is no evidence that it is scientifically possible ever to identify a typist by comparing typing errors with errors in standards of comparison. Assuming that that is scientifically possible in some instances, there is no evidence as to what errors would be significant, *e. g.,* which are usual (accounted for, perhaps, by the adjacent position of letters on the keyboard) and which unusual and hence possibly significant. Lacking such evidence, a jury, who "manifestly know nothing about it", should not be permitted to reach a conclusion by "indulging in mere guesswork" (*United States* v. *Lumbra,* 63 F. (2d) 796, C. A. 2 [1933],

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*FBI Agent McCool had typed in court on the Woodstock typewriter (R. 3019). The purpose of his doing so was to show that the typewriter could be used (R. 3253). Presumably the jury requested the material typed by him (Gov. Ex. 66-A) for comparison with the other typed documents. In the circumstances of the typing, it is not surprising that Government's Exhibit 66-A contained few typing errors.

aff'd 290 U. S. 551; see also *United States* v. *Clapp,* 63 F. (2d) 793, 795, C. A. 2 [1933]).

But even if a different conclusion were reached by what we submit would be the inapt analogy of handwriting cases (*e. g., In re Goldberg,* 91 F. (2d) 996, 997, C. A. 2 [1937]), the prosecutor's invitation to the jury was, in the circumstances of this case, prejudicial error. If Feehan had found in a comparison of common typing errors the basis for an opinion that Mrs. Hiss was the typist, surely that opinion would have been elicited. Thus the prosecutor invited the jury to reach for themselves a conclusion demonstrated by his own witness to be unsupportable. Beyond that there were, as we have shown (pp. 42-3), typing errors and corrections of typing errors common to the Baltimore documents and various papers in evidence not typed by Mrs. Hiss. The prosecutor's argument from common typing errors is thus, as anyone could see who had all the material before him, controverted by the showing that it could as easily identify others. It was manifestly improper to ask the jury to use in their comparison only the standards typed by Mrs. Hiss.

On Chambers' redirect examination, the prosecutor read his prepared statement to the House Committee on August 3, 1948 (R. 598-600), including the following (R. 599):

> ". . . For a number of years I had myself served in the underground, chiefly in Washington, D. C. The heart of my report to the United States Government consisted of a description of the apparatus to which I was attached. It was an underground organization of the United States Communist Party developed, to the best of my knowledge, by Harold Ware . . . I knew it at its proper * level, a group of seven or so men . . .
>
> The head of the underground group at the time I knew it was Nathan Witt . . . Later, John Abt became the leader. Lee Pressman was also a member of this group as was Alger Hiss . . ."

At the trial, Chambers (dropping the phrase "to the best of my knowledge") testified that Ware was "the organizer

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*In the original the word is "top".

of a large Communist organization in Washington" (R. 233), that he was introduced to appellant by Ware and J. Peters (R. 233), and that the substance of their conversation was that appellant "was to be disconnected from the apparatus which Ware was then organizer of; that he was to become a member of a parallel organization as it is called, which I was then organizing" (R. 235).*

Previously, on cross-examination regarding his interview at the FBI offices with Martha Pope, Chambers had volunteered (R. 463):

> "Q. And she told you in no uncertain terms that she did not recognize you? A. She told me in a quiet pleasant way that she did not recognize me.
>
> Q. Well, there wasn't any qualification in her answer, was there? A. I can tell you exactly what she said.
>
> Q. Tell us. A. She said that she could not remember my coming to the Hisses' house but she remembered Mr. Lee Pressman and Mr. Nathan Witt as being there very often."

This was put in its proper light by Martha Pope's testimony that she had mentioned them only "when they asked me," and had remembered them "by reading the papers, that is all; that is what reminded me of it" (R. 1552).

Witt, Abt and Pressman were appellant's fellow-employees in the Agricultural Adjustment Administration; appellant and Pressman had been classmates at the Harvard Law School and fellow-editors of the Harvard Law Review, and they had both for a time been associated with the International Juridical Association in New York, which published a periodical dealing largely with civil rights and labor matters (R. 1809-12, 2142-3, 2146). Appellant was questioned on two occasions by the FBI, and in March, 1948, by the Grand Jury about his associations with Witt, Abt and Pressman (R. 2138, 2142-3; Defs. Exs. 5xE, 5xF); but it may fairly be inferred that the source of these inquiries was Chambers himself, through his reports to Berle and Murphy (Gov. Exs. 17, 18).

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*This testimony, it will be observed, differs from Chambers' statement to the House Committee that he himself was attached to Ware's apparatus.

On this flimsy basis, the prosecutor played on appellant's alleged association for Communist purposes with Pressman, Witt and Abt so as to imply that here was evidence independent of Chambers supporting Chambers' accusation (see *e.g.*, R. 1550-2, 2070-2, 2100, 2116-7, 2135-6, 2385, 3076-7). Thus in the summation (R. 3238-9, 3240):

> ". . . I think Mr. Hiss is a prototype. He is the example of what a lot of people here named, we named in the trial, resemble. I think he is the prototype of Pressman and Witt and Abt. . . ."
>
> * * * * * *
>
> "How about Pressman and Witt and Abt, . . . all of these people who were friends? Why weren't they here? You don't suppose it is because perhaps I had a file on some, do you? You don't suppose that they were afraid to sit there (indicating witness chair)? And these were his friends, the maids told us, at the house discussing office affairs on Sunday. They couldn't see enough of each other during the daytime, the week time, but had to come on Sundays to discuss office matters."

Apart from the impropriety of asserting in this way a vitally prejudicial charge of Communist activity with Pressman, Witt and Abt, it was prejudicial error for the prosecutor to charge appellant with not producing them as witnesses. It is matter of public record that each of them had declined, on the ground of self-incrimination, to testify before the House Committee (House Committee Hearings, pp. 1015-33). The prosecutor knew this, and knew therefore why the defense could not call them. It cannot be assumed that the jury understood.

Compounding the prejudicial effect, the prosecutor went outside the record to tell the jury that he "had a file" on Pressman, Witt and Abt. Doubtless he hoped that the jury would believe (as they were likely to) that the "file" contained something incriminating appellant.

There was other improper comment on absent witnesses, for example (R. 3239):

> ". . . Where is Maxim Lieber? There is the man who would explain Smithton. . . . You heard his name is right in the Manhattan phone book. . . ."

Lieber was a friend of the Chamberses (p. 7, *supra*). There is no testimony but Mrs. Chambers' (R. 1041, 1065) that he ever met either of the Hisses. Chambers said he was a Communist (R. 248). He had executed with Chambers a false certificate of doing business under an assumed name, in which Chambers' "true . . . full name" was given as "Lloyd Cantwell" (R. 623-6). Certainly if anyone was to call him it was the Government.

There is space only for brief reference to some of the other instances of statements and implications in the summation contrary to or unsupported by the record.

The prosecutor said (R. 3227):

> ". . . They [the Hisses] had to make up a story about the P Street place because it was obvious Mr. Chambers said that he lived at P Street and lived at 28th Street . . ."

In fact appellant told the House Committee on August 16 and 17, 1948, about the Chambers family's occupancy of the 28th Street apartment and visit to the P Street house (R. 1872, 1990; House Committee Hearings, pp. 948-9, 980). Chambers' earlier testimony at an executive session had mentioned staying at appellant's, but in a way inconsistent both with the actual events and with Chambers' own later testimony (House Committee Hearings, pp. 665-6, 671).

Stating that the defense "complained" about the story of the alleged $400 loan (first mentioned at the first trial) because "they had not had as long a time to alibi it as they had with other things", the prosecutor continued: ". . . Everything else was in the pre-trial depositions in Baltimore or in Congress . . ." (R. 3233). In fact a number of alleged events were admittedly first testified to by the Chamberses at the second trial (see, *e.g.*, footnotes, p. 67, *supra*). As to one of these, an alleged trip to Long Eddy in 1935, the prosecutor went further (R. 3232):

> ". . . Long Eddy . . . means that there is corroboration for a story told contemporaneously. He was subpoenaed the day before he showed up at the House Committee—the day before."

Not only was the story not told contemporaneously; there was in fact no "corroboration".

The prosecutor said that "Mr. Dulles was in there fighting to get him out" of the presidency of the Carnegie Endowment (R. 3222). On Dulles's own testimony, he voted with the other members of the Executive Committee in February, 1949, to extend appellant's leave of absence until May, 1949 (R. 3083; see also Def. Exs. 6xI, 6xJ, 6xL).

With regard to the sources of the Baltimore documents, the prosecutor misstated the defense. He said: ". . . Mr. Cross indicated that Mr. Wadleigh was the thief, not Mr. Hiss, but Mr. Wadleigh was. . . ." (R. 3236). In fact, the defense was not that Wadleigh was *the* thief, but only one of three or more (see, *e.g.*, R. 3158, 3161-2).

The prosecutor misstated Chambers' testimony regarding Baltimore Exhibit 10, the typewritten document not typed on the Woodstock (R. 3235):

> ". . . He said 'No. You are right.'
> Remember he said, 'you got a first for someone there.'
> He admitted it. He did not try to worm out of it at all. He admits that like a man. That is one exhibit which we could not prove anyway. . . ."

Far from "admitting it like a man", Chambers maintained: "I believe Alger Hiss gave me that paper" (p. 33, *supra*).

The prosecutor said (R. 3260-1):

> "Chambers says in 1939, in the Berle report 'Who sent Henderson's report back to Moscow? It came from Washington.'
> Who sent it? Chambers sent it. Where did he get it? From Alger Hiss. . . ."

The reference in the Berle notes (Gov. Ex. 18) is to Henderson's report of an interview with Mrs. Rubens (see R. 2163-9). There is no testimony even by Chambers either that he sent that report to Moscow or that he got it from appellant. But the prosecutor's reference was clearly calculated to mislead the jury into identifying the Henderson report mentioned in Berle's notes with the Henderson cable underlying Baltimore Exhibit 1.

The prejudicial effect of the error pervading the prosecutor's summation (exemplified in the foregoing discussion) was sharpened by the fact that his summation came on the day the case was submitted to the jury. The reasoned and temperate summation in appellant's behalf, delivered the day before, could not protect him adequately against the later prejudicial attack.

POINT VI

The Court erred in its instructions to the jury.

The Court's instructions to the jury were weighted in favor of the Government and against appellant. The instructions, especially with respect to the issue of corroboration, were not such as were required to help the jury perform their exceptionally difficult task. The instructions did nothing to protect appellant against the prosecutor's prejudicial action.* Appellant's requests to charge covered most of these matters; as to error not so covered (*e.g.*, the last words of the charge) we submit that, under the rule of *Wiborg* v. *United States,* 163 U. S. 632 (1896), there was no need to except. As will appear from reading the charge as a whole, moreover, appellant's interests could not have been protected, once the charge had been delivered, by attempted corrections or additions.

The weighting of the instructions against appellant resulted in some instances from a structure by which a requested statement favorable to appellant was followed immediately by matter nullifying its effect. Thus appellant had requested a charge (Req. No. 38(c), R. 3191-2):

> "You are not to construe the denial by the Court of any motion made to dismiss this indictment as any indication of the guilt or innocence of the defendant, as such a ruling is not to be considered by you."

*The Court said: " . . . you have heard the testimony discussed in great detail by able counsel who have prepared and presented their cases well . . . " (R. 3267).

The Court, having endorsed the request "Will be covered", charged (R. 3266-7):

> "The fact that the court has denied motions by the defendant to dismiss the indictment is not to be taken by you as an indication that the defendant is believed by the court to be guilty, but it does mean that a case has been presented which should be decided by a jury."

This in itself changed the emphasis; but the charge continued:

> "It means that there is enough evidence upon which, if you find it true, you may render a verdict of guilty on both counts of the indictment."

Again, portions of the charge on reasonable doubt favorable to appellant or of neutral effect (R. 3265, 3266) were followed immediately by instructions unfavorable to him (R. 3265-6, 3266). The last of these passages was especially harmful. Appellant's request to charge (Req. No. 31, R. 3189, endorsed by the Court "Will be covered") included the following:

> "By the term 'reasonable doubt' is meant a doubt which is reasonable, a doubt of such a quality as that, were a doubt of like quality to arise in your private lives in connection with some important decision required to be made by you, you would hesitate and pause in that decision . . ."

The Court's instruction was (R. 3266):

> "Now, if, after a careful and full consideration of all the testimony, and the exhibits, you are convinced of the defendant's guilt, and such conclusion is one in which you yourself would be willing to rely upon and to act upon in the more important matters of your own private life, then it may be said that you have no reasonable doubt."

The difference is vital. One must in many important matters of one's private life act in one way or another despite serious doubt as to the relevant facts. The proper analogy in defining reasonable doubt is whether one would pause or hesitate before acting (see *Hopt* v. *Utah,* 120 U. S. 430, 441 [1887]).

Just before this paragraph, the instructions dealt with character evidence (R. 3266). The charge requested by ap-

pellant (Req. Nos. 41, 42, R. 3192-3), and required by *Edgington* v. *United States,** *supra,* was included; but again what immediately followed nullified its effect. This treatment of character evidence was especially prejudicial in view of the way in which the prosecutor had treated it. Apart from attacks on individual character witnesses, he had attacked the *Edgington* doctrine during the trial (R. 1494, 2422) and in summation:

> "I ask you ladies and gentlemen what kind of a reputation did a good spy have? Of course it must be good. The fox barks not when he goes to steal the lamb. . . . But we are here on a search for truth. We are not concerned with reputations. Poppycock." (R. 3216)
>
> * * * *
>
> "Ladies and gentlemen, character witnesses belong to another era. This is the age of reason. This is the age of common people. And what we want are facts. We are here, you are here, Judge Goddard is here to ascertain the facts. We don't want gossip." (R. 3217)

Thus the prosecutor not only disparaged the character evidence but (as in the paragraph first quoted) sought to turn it against appellant by making it appear that he had deceived even his friends. The Court's instructions, especially the sentence: "It may be that those with whom he had come in contact previously have been misled and that he did not reveal to them his real character or acts" (R. 3266), must have seemed to the jury endorsement of the prosecutor's argument. This was prejudicial error (*Perara* v. *United States,* 235 Fed. 515, C. A. 8 [1916]).

As the Court properly instructed the jury (R. 3273), they could not convict on either count unless they believed Chambers' testimony. As the Court wrote in a memorandum (not read to the jury) on the admissibility of the psychiatric testimony, Chambers' credibility was "one of the major issues upon which the jury must pass" (R. 2517). Appellant requested the Court to instruct the jury with respect to factors to be taken into account in judging Chambers' credibility and the caution with which the jury should

* Approved in *Michelson* v. *United States,* 335 U. S. 469, 476 (1948).

regard the testimony of such a witness (Req. Nos. 6 [R. 3181], 40 [R. 3192]). Request No. 6 was endorsed "Will be covered". Request No. 40 was endorsed "Denied".* The instructions as to the credibility of witnesses (R. 3267-70) included no special cautionary comment on Chambers (except for discussion of the psychiatric testimony, dealt with below) and mentioned none of the special factors referred to in these requests.

In all the circumstances of this case, and in the particular circumstance that this was a prosecution for perjury based primarily on the testimony of an admitted perjurer and asserted accomplice in the alleged underlying espionage,** we submit that it was prejudicial error for the Court to depart from what even in other circumstances is "the better practice" as to alleged accomplices (see Jackson, J., concurring, in *Krulewitch* v. *United States,* 336 U. S. 440, 454 [1949]; *United States* v. *Becker,* 62 F. (2d) 1007, 1009, C. A. 2 [1933]) and what in another Circuit is the required practice as to admitted perjurers (*Speiller* v. *United States,* 31 F. (2d) 682, C. A. 3 [1929]; see *United States* v. *Margolis, supra,* 138 F. (2d) at 1004).

The charge, in so far as it concerned the bearing of the psychiatric testimony on the question of Chambers' credibility (R. 3269-70), went far to deprive that testimony of any value to appellant. Stating that the expert testimony was "purely advisory",*** the charge continued (R. 3270):

> ". . . You may reject their opinions entirely if you find the hypothetical situation presented to them in the question to be incomplete or incorrect or if you believe their reasons to be unsound or not convincing."

and later (R. 3270):

> ". . . It is for you to say how much weight, if any, you will give to the testimony of the experts—and of Mr. Chambers."

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* Appellant excepted to the denial of all requests so endorsed (R. 3176-7).

** Neither Chambers' admitted perjury nor his position as an asserted accomplice was specifically mentioned in the requests, but we submit that the request for an instruction that "the evidence of such a witness should be received by you with suspicion and with the greatest of care and caution" (R. 3192) sufficiently presented the essential point.

*** Compare appellant's Request No. 6A (R. 3181); and see *Aetna Life Ins. Co.* v. *Kelley,* 70 F. (2d) 589, 592-3, C. A. 8 (1934).

and at the conclusion of the discussion (R. 3270):

> ". . . Even though you may accept the expert's opinions as to Mr. Chambers' mental condition, you may still find that Mr. Chambers was telling the truth when he testified regarding those particular matters."

There was no corresponding statement of the alternatives favorable to appellant. Moreover, the charge commented on the hypothetical question without mentioning the fact, conceded by the prosecutor (R. 2870), that in larger part it was a summary of facts testified to by Chambers; nor did it mention the fact that both experts based their opinions in part on a study of Chambers' writings and translations. There was, finally, nothing in the charge to offset the prosecutor's improper attack (pp. 107-8, *supra*).

The Court also instructed the jury that Feehan's expert testimony was "purely advisory" and that they might "reject it entirely" (R. 3272). This also was damaging to appellant, though in a different way. Feehan's testimony (as the Court recognized and stated before referring to Feehan) was actually on a point "not contested by the defense" (R. 3272), *i.e.*, that the Baltimore typed exhibits were typed on the Woodstock typewriter. Since the point was not contested, there was no reason for referring at all to Feehan's testimony; and the statement in the charge that the jury might reject it was meaningless. The damage to appellant lies in the likelihood that the reference to Feehan, coming after the prosecutor's unfounded argument from the existence of common typing errors (pp. 108-9, *supra*), misled the jury into thinking that Feehan (who had testified long before, on December 7) must in his testimony have lent support to that argument by testifying to more than the identification of the typewriter.* That likelihood was increased by the reference twice in one paragraph to "letters allegedly ** written by Mrs. Hiss", when in fact one

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* A reading of the first full paragraph on R. 3272 will show how easily a listener might have thought that the Court's references to "defects in the type" were actually to "defects in the typing".

** There was no dispute that Mrs. Hiss had typed the letters in evidence attributed to her.

of the four standards of comparison used by Feehan had been typed not by Mrs. Hiss but by her sister, Daisy Fansler (R. 1074; Gov. Ex. 37).

During the trial * and repeatedly in his summation (R. 3226, 3228, 3230, 3232, 3237, 3239) the prosecutor applied the word "corroboration" to matters not within the direct issues under the indictment and applied it in the loose non-perjury-case sense of lending support to (rather than independently establishing the truth of) the testimony to which it related. Even without this, it would have been essential for the Court to make clear to the jury how to deal with the issue of "real corroboration" (*United States* v. *Isaacson, supra,* 59 F. (2d) at 968) on the direct issues.

In this case, as the discussion in Point I shows, it was impossible to deal adequately in the charge with the applicable law of corroboration without relating that discussion to the evidence. Various of appellant's requests to charge were denied with the endorsement "Denied as I shall not discuss the evidence in detail", or similar endorsement (Req. Nos. 7 [R. 3181-2], 19-26 [R. 3186-8]). The charge did deal in some respects with evidence supporting the Government's contentions as to corroboration (*e.g.,* in the wholly unnecessary discussion of Feehan's testimony, just referred to). The single reference to appellant's evidence against corroboration, "the defense claims that this typewriter was given away when the Hisses moved to the Volta Place house at the end of December, 1937" (R. 3272), was an incomplete and inadequate statement of the defense position even on the single subject of the typewriter.

Especially since the Court did comment on the evidence to some extent, appellant was entitled to have his defense on the facts clearly presented to the jury. He was entitled also to have the jury instructed in the applicable law so that they could rationally perform their function. The instructions as to the law of corroboration could only have confused the jury, not enlightened them.

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* See pp. 51-2, 89, *supra.*

Early in the charge, the Court properly instructed the jury that appellant did not have to prove how or from whom Chambers obtained the documents, the burden being upon the Government to prove beyond a reasonable doubt that he obtained them from appellant (R. 3265). Later the Court charged that there was "enough evidence upon which, if you find it true, you may render a verdict of guilty on both counts of the indictment" (R. 3267), that "the issues in the case are simple . . ." (R. 3267), and (in relation to the instruction regarding credibility) that " . . . it is for you . . . to determine what the truth is" (R. 3268).

As to the method of proof, the charge, before dealing at all with the law of corroboration in perjury cases, dealt at length with circumstantial evidence. Referring to "circumstances from which you are able to draw reasonable conclusions and deductions", and "facts which have a legitimate tendency to lead the mind to a logical conclusion as to the existence or non-existence of the disputed fact", the instructions continued (R. 3271):

> "Circumstantial evidence is entitled to as much consideration as you find it deserves, depending upon the inferences you think it necessary and reasonable to draw from the circumstances. . . . Whether a fact is proved by circumstantial evidence or by direct proof is immaterial, for in either event it must be proved beyond a reasonable doubt."

Thus the jury's initial instruction on the question of proof might well lead them to conclude that any legitimate inference could support a conviction, despite the existence of other reasonably possible inferences.

The subject of corroboration was introduced later with a quotation of the *Weiler* rule (R. 3273) but without elucidation of the meaning of "substantiates"; and, without such elucidation, the jury would naturally understand it to mean no more than the rule of circumstantial evidence as that had previously been explained to them.

Finally the Court did charge that the jury "must believe beyond a reasonable doubt that the corroborative testimony [*sic*] is inconsistent with the innocence of the de-

fendant" (R. 3274).* But this brief instruction, even if it be assumed that the jury understood it fully in the context of what had gone before, left them without any practical guidance in its application; and, whatever it meant to them, there is more than a possibility that it was driven from their minds by what followed almost immediately (R. 3274):

> "Now, the Government says that the affair was carried on with great secrecy so as to escape possible detection, and that no one else was present when the alleged acts took place. The Government, however, urges that facts and circumstances have been proved which, it says, fully substantiate the testimony of Mr. Chambers. This is an issue to be determined by you."

Even if the charge on the facts and law relating to corroboration in this case had been of the clearest adequacy, this paragraph, stating emphatically the Government's contention regarding corroboration and wholly ignoring the defense contentions would, we submit, be prejudicial error (see *Allison* v. *United States,* 160 U. S. 203, 212 [1895]).

The Court erred in the charge with respect to the second count ** in that, having properly instructed the jury that under the two-witness rule the testimony of Chambers and Mrs. Chambers as to alleged meetings after January 1, 1937, must relate to the same "particular meeting or meetings" (R. 3273), the Court further instructed them that they might find "by Mr. Chambers' testimony and . . . Mrs. Chambers' testimony" that there were such meetings (R. 3274). In fact Chambers and Mrs. Chambers did not, in any instance of alleged meetings after January 1, 1937, testify to the same meeting (pp. 53-4, *supra*). It was "clearly error . . . to charge . . . upon a supposed or conjectural state of facts, of which no evidence has been offered" (*United States* v. *Breitling,* 20 How. 252, 254-5 [1858]; see also *Quercia* v. *United States,* 289 U. S. 466, 470 [1933]). Nor can it be assumed that the jury could have remembered for them-

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* See Requests Nos. 15-17 (R. 3184-5).

** See also Point II. As with respect to the point there discussed, appellant had made an adequate request to charge (R. 3195; see also R. 3176) and excepted after the charge (R. 3277).

selves that the only alleged meetings to which both Mr. and Mrs. Chambers had testified were before January 1, 1937.

Finally, after a statement that "a juror should not refuse to listen to the arguments of other jurors equally intelligent and equally earnest in the effort to mete out justice" (R. 3276)—not "to do justice"—came the Court's last word to the jury (R. 3276):

> "Now, ladies and gentlemen, if you find that the evidence respecting the defendant is as consistent with innocence as with guilt, the defendant should be acquitted. If you find that the law has not been violated you should not hesitate for any reason to render a verdict of acquittal. But, on the other hand, if you find that the law has been violated as charged, you should not hesitate because of sympathy or for any other reason to render a verdict of guilt, as a clear warning to all that a crime such as charged here may not be committed with impunity. The American public is entitled to be assured of this."

This was the culminating weighting of the charge against appellant. Gone are the concepts of reasonable doubt and corroboration. As to the last sentence, surely the American public was as entitled to be assured that appellant would be acquitted if he were not proven guilty as to be assured of his conviction if he were.

POINT VII

The Court erred in its supplemental instructions.

Having commenced its deliberations at 3:10 P. M. on Friday, January 20 (R. 3277), having asked for various exhibits and the reading of certain of the testimony (R. 3278-87), and having retired for the night at 10:45 P. M. (R. 3287), the jury next morning sent to the Court the following communication (R. 3288):

> "Your Honor, without reading the entire charge, will you please define the following: reasonable doubt; circumstantial evidence, acceptable corroborative evidence and their relation to each other."

The Court thereupon read to the jury portions of the

original instructions (R. 3288-91), concluding the reading as follows (R. 3291):

> "Now, the Government says that the affair was carried on with great secrecy so as to escape possible detection and that no one else was present when the alleged acts took place. The Government, however, urges that facts and circumstances have been proved which, it says, fully substantiate the testimony of Mr. Chambers.
>
> The Court: Does that answer your question?
>
> The Forelady: Yes, your Honor, thank you."

The jury thereupon retired at 10:55 A. M. (R. 3291).

At 11:25 A. M. counsel for appellant (having obtained a copy of the original instructions, which he had not had at the time of the reading [R. 3292]), requested the Court in chambers (R. 3292) to recall the jury and read to them in addition to what had just been read: (1) the two paragraphs of the original instructions relating to character evidence (R. 3266), which in the original charge were treated as an integral part of the instructions regarding reasonable doubt (R. 3265-6) and which contained a sentence stating the *Edgington* rule; (2) the sentence from the original charge following, as part of the same paragraph, the last words of the supplemental charge quoted above (*i. e.*, "This is an issue to be determined by you" [R. 3274]); and (3) the immediately following paragraph of the original charge (R. 3274). The Court having denied the request, counsel excepted (R. 3292-3).

The jury, having gone to lunch at 12:55 P. M. (R. 3293), returned a verdict of guilty at 2:47 P. M. on Saturday, January 21 (R. 3294).

The jury's request for additional instructions shows at the least that the original instructions had not been clear to all the jurors. The fact that the jury had been unable to reach agreement for so long emphasized the obligation of the Court to assist them in a dispassionate and informed attempt to come to agreement. The mere rereading of portions of the original instructions was not enough.

But the prejudice to appellant came from more than that inadequacy. The original instructions on reasonable doubt

were weighted against appellant. It was, we submit, prejudicial error to omit from the rereading the statement of the *Edgington* rule which the Court had originally incorporated therein.

The end of the rereading was the essence of prejudicial error. The last words that we have quoted above were not, in the original instructions or here, part of the definition of corroborating evidence; and it was definition that the jury had requested. Those words were, as we have noted in Point VI, an emphatic statement of the Government's contention regarding corroboration, wholly ignoring the defense contentions. Still worse, the palliative last sentence of the original paragraph, "This is an issue to be determined by you," was omitted in the rereading.

We submit that, if there were no other reason for reversing the judgment of conviction, this ground alone would require reversal (*Bollenbach* v. *United States,* 326 U. S. 607 [1946]; *Burton* v. *United States,* 196 U. S. 283 [1905]; *Spurr* v. *United States,* 174 U. S. 728 [1899]).

POINT VIII

The Court erred in denying appellant's motions to dismiss the indictment and to arrest the judgment.

Appellant moved to dismiss the indictment (R. 1310-3) on the ground, among others, that his testimony before the Grand Jury was elicited with the intent of indicting him for perjury and prosecuting him in that guise for an alleged offense barred by the Statute of Limitations. At the end of the trial appellant renewed the motion (R. 3089), and after verdict moved to arrest the judgment (R. 3298).

Like questions had been asked during the eight days on which appellant had testified before December 15, and his replies had been substantially the same as those for which he was indicted (R. 69-70, 204-6, 209, 211). Plainly, the questions on December 15 did not seek information.

Alexander M. Campbell, Assistant Attorney General, stated to appellant on December 14: "The FBI has cracked

this case. You are going to be indicted" (R. 27),—in effect that appellant would be asked before the Grand Jury whether he had committed espionage, and, upon his denial, would be indicted for perjury. On argument of a motion for inspection of the Grand Jury minutes, Raymond P. Whearty, one of the two Government counsel before the Grand Jury, said: "We didn't know whether they were going to return an indictment but we did know the only possible indictment was an indictment against Hiss for perjury" (R. 77).

Campbell's prophecy was fulfilled. The indictment was returned just before the final discharge of the Jury at about 5:00 P. M. on December 15 (R. 207).

Though appellant was in form tried for perjury, he was in fact obliged to meet a charge of ancient crime when "evidence has been lost, memories have faded, and witnesses have disappeared" (*Telegraphers* v. *Ry. Express Agency,* 321 U. S. 342, 349 [1944]). The difficulties he faced have been illustrated in this brief. We add one further example. Appellant was accused by the prosecutor of having destroyed evidence because, when he moved to New York in 1947, he disposed of his personal checks more than ten years old (R. 2224-5, 3242).

We have found one case that condemns the practice here employed (*Bennett* v. *District Court of Tulsa County,* 81 Cr. [Okla.] 351, 162 P. (2d) 561 [1945]), and none that condones it. We submit that this Court should join in condemnation.

Respectfully submitted,

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The Hecla Press : . New York City
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